No. 2791

United States
Circuit Court of Appeals
For the Ninth Circuit

THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole TRUSTEE under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913,

Appellant,

vs.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, WILLIAM T. WALLACE as Receiver of Great Shoshone and Twin Falls Water Power Company, GUY I. TOWLE, and CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, Defendants, and L. M. PLUMMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, JAKE M. SHANK, and AMERICAN WATER WORKS AND ELECTRIC COMPANY, a Corporation, interveners,

Appellees.

AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, intervener, Appellant,

vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, and WILLIAM T. WALLACE, as Receiver of Great Shoshone and Twin Falls Water Power Company, Defendants, L. M. PLUMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, and JAKE M. SHANK, interveners, and THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole Trustee under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913, Appellees.

BRIEF OF APPELLEES

L. M. PLUMER and E. B. SCULL AS EXECUTORS OF THE ESTATE OF L. L. McCLELLAND, DECEASED, AND JAKE M. SHANK, IN REPLY TO BRIEFS OF BOTH APPELLANTS, THE EQUITABLE TRUST COMPANY OF NEW YORK AND THE AMERICAN WATER WORKS AND ELECTRIC COMPANY.

Upon Appeal from the United States District Court for the District of Idaho, Southern Division

---

MARTIN & CAMERON, Residence Boise, Idaho,
Solicitors for L. M. Plumer and E. B. Scull as Executors of the Estate of L. L. McClelland, Deceased.

ALFRED A. FRASER, Residence, Boise, Idaho,
Solicitor for Jake M. Shank.

United States
Circuit Court of Appeals
For the Ninth Circuit

THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole TRUSTEE under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913,

Appellant,

vs.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, WILLIAM T. WALLACE as Receiver of Great Shoshone and Twin Falls Water Power Company, GUY I. TOWLE, and CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, Defendants, and L. M. PLUMMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, JAKE M. SHANK, and AMERICAN WATER WORKS AND ELECTRIC COMPANY, a Corporation, interveners,

Appellees.

AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, Intervener, Appellant,

vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, and WILLIAM T. WALLACE, as Receiver of Great Shoshone and Twin Falls Water Power Company, Defendants, L. M. PLUMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, and JAKE M. SHANK, interveners, and THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole Trustee under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913, Appellees.

BRIEF OF APPELLEES

L. M. PLUMER and E. B. SCULL AS EXECUTORS OF THE ESTATE OF L. L. McCLELLAND, DECEASED, AND JAKE M. SHANK, IN REPLY TO BRIEFS OF BOTH APPELLANTS, THE EQUITABLE TRUST COMPANY OF NEW YORK AND THE AMERICAN WATER WORKS AND ELECTRIC COMPANY.

Upon Appeal from the United States District Court for the District of Idaho, Southern Division

---

MARTIN & CAMERON, Residence Boise, Idaho,

Solicitors for L. M. Plumer and E. B. Scull as Executors of the Estate of L. L. McClelland, Deceased.

ALFRED A. FRASER, Residence, Boise, Idaho,

Solicitor for Jake M. Shank.

United States
Circuit Court of Appeals
For the Ninth Circuit

THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole TRUSTEE under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913,

Appellant,

vs.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, WILLIAM T. WALLACE as Receiver of Great Shoshone and Twin Falls Water Power Company, GUY I. TOWLE, and CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, Defendants, and L. M. PLUMMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, JAKE M. SHANK, and AMERICAN WATER WORKS AND ELECTRIC COMPANY, a Corporation, interveners,

Appellees.

AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, intervener, **Appellant,**

vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, and WILLIAM T. WALLACE, as Receiver of Great Shoshone and Twin Falls Water Power Company, Defendants, L. M. PLUMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, and JAKE M. SHANK, interveners, and THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole Trustee under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913, Appellees.

BRIEF OF APPELLEES

L. M. PLUMER and E. B. SCULL AS EXECUTORS OF THE ESTATE OF L. L. McCLELLAND, DECEASED, AND JAKE M. SHANK, IN REPLY TO BRIEFS OF BOTH APPELLANTS, THE EQUITABLE TRUST COMPANY OF NEW YORK AND THE AMERICAN WATER WORKS AND ELECTRIC COMPANY.

Upon Appeal from the United States District Court for the District of Idaho, Southern Division

---

BRIEF OF APPELLEES.

This brief is in answer to the briefs of both the appellants in this case.

There are so many inaccuracies in the Statement

of Facts set forth in the briefs of the appellants and so many colorings of the facts as stated by them that appellees have made a statement of facts and based the same on the record in this case.

These two appeals are the last of a series of joint efforts and schemes of two allied corporations, the Equitable Trust Company of New York and The American Water Works & Electric Company to save unto themselves all the assets of the debtor corporation and prevent four creditors from receiving from the assets of the debtor corporation the payment of their four claims. Though now masquerading as hostile parties, they are now and have been at all times, in this litigation hand in hand.

See par. XVIII Tr. p. 299.

Dietrich's Decision Tr. p. 304 middle of page.

STATEMENT ON APPEALS OF EQUITABLE TRUST COMPANY OF NEW YORK AND AMERICAN WATER WORKS AND ELECTRIC COMPANY.

These appeals grow out of the decree and certain orders made in a suit brought to foreclose a deed of trust and supplemental mortgages. The deed of trust and supplemental mortgages involved purported to cover all the property of the Great Shoshone and Twin Falls Water Power Company. This latter corporation was, at the time of the trial in the lower court, and still is, insolvent and in the hands of a receiver.

The parties interested in these appeals should be grouped or arranged as follows:

First: The mortgagee or trustee under the deed of trust and supplemental mortgages. This party is the appellant, The Equitable Trust Company of New York, complainant in the court below. It feels itself aggrieved because the court allowed two creditors of the Great Shoshone and Twin Falls Water Power Company to intervene in the mortgage foreclosure suit and, together with two other creditors originally named as defendants, to contest the validity of the deed of trust and supplemental mortgages insofar as these instruments attempted to create a lien valid as against attacking creditors upon certain personal property of the debtor company. These four attacking creditors who thus answered and made this contest secured a decree of the Court to the effect that the lien of the deed of trust and supplemental mortgages, as to certain personal property of the mortgagor, was subject and subordinate to the lien of their claims because of certain defects in the form, execution, recording, and filing of the deed of trust and supplemental mortgages. (Trans. pp. 191-192). This provision in the decree of foreclosure forms the basis of the principal assignments of error made by the Equitable Trust Company in this appeal. It was stipulated by the four attacking creditors and The Equitable Trust Company of New York that all the property of the debtor corporation should be sold as an entirety, which was done, and it was further stipulated by the same parties that the value of the par-

ticular personal property upon which the four attacking creditors had been given a prior claim or lien was $45,000.00, the approximate aggregate amount of their four claims. As before stated, the property has been sold under the decree and the Special Master who made the sale has on hand or can procure at once the sum of $45,000.00 realized from the sale of this personal property upon which the four attacking creditors were declared to have prior liens, and the Special Master has been ordered by the Court to pay the claims of the four attacking creditors out of these funds, in accordance with the terms of the decree of foreclosure and a court order thereafter made (Trans. 204, 205, 206, 240-243). The carrying out of this particular portion of the decree of foreclosure and of the above court order have been stayed by this appeal.

Second: In a second group should be placed the four creditors who appeared and answered in the foreclosure suit, each one on his own behalf, and who, in the decree of foreclosure, were adjudged by the court to have superior claims and liens upon some of the personal property of the mortgagor, and to whom the lower court has ordered the Special Master to pay the moneys realized from the sale of such property. These four creditors are the appellees, Guy I. Towle, Carl J. Hahn, as administrator of the estate of Harry M. King, deceased, L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, and Jake M. Shank. They are the parties against whom are directed the appeals of both The

Equitable Trust Company of New York, the original complainant, and the American Water Works and Electric Company, a would-be intervenor.

Third: The only other party interested in these appeals is this same American Water Works and Electric Company, appellant. This latter company is a creditor of the Great Shoshone and Twin Falls Water Power Company holding a claim for approximately $1,268,434.66. It has never become a party to this litigation by intervention or otherwise. While the four attacking creditors were making their fight against this trust deed and supplemental mortgages in the lower court, the American Water Works and Electric Company, with full knowledge of the proceedings, did not join with the attacking creditors or aid them at all, but, instead seemed to have allied itself with the Equitable Trust Company of New York, complainant, under some sort of an arrangement by which its claim was to be taken care of in reorganization plans. Instead of aiding the four attacking creditors, its president, H. Hobart Porter, who was also president of the Great Shoshone and Twin Falls Water Power Company, sent a telegram in the midst of the trial to his attorney directing this attorney to file an answer on behalf of the Great Shoshone and Twin Falls Water Power Company admitting all the allegations of the bill of complaint and supplemental bill of complaint (Trans. 174-175). But after the decree of foreclosure had been entered and after the four attacking creditors, presuming that no other creditors intended to or could intervene, without re-

gard to the actual value of the property, had been allowed to enter into a stipulation that the value of the property upon which they had been adjudged prior liens was only $45,000.00, the aggregate amount of their claims, and after the sale had been held, and after the motion for the confirmation of the sale had been heard, the American Water Works and Electric Company suddenly changed sides and sought to intervene in this action not for the purpose of attacking the lien of the mortgage as the other four creditors had done but for the sole and only purpose of prorating with the four attacking creditors in the fund which they had won for themselves, and thus to take from the four creditors ninety-six and one-half per cent of the fruits of their struggle. No satisfactory excuse was offered for its apparent laches nor could the court, under the circumstances, see any equity in its petition to intervene, and therefore its petition to intervene was denied. Thereupon the court ordered the Special Master to pay the four attacking creditors the amounts of their claims out of the funds in his hands for that purpose. The denial of is petition to intervene and the above order of the court relative to payment of the four attacking creditors claims constitute the grievances of the American Water Works and Electric Company.

The facts of the case stated more fully and in chronological order are these:

On November 2, 1914, Guy I. Towle filed a complaint in the United States District Court for the District of Idaho, Southern Division, against the

Great Shoshone and Twin Falls Water Power Company alleging that he was a creditor of that corporation; that the value of the property of the company if properly conserved and continuously operated was greatly in excess of the amount of its liabilities, but that owing to financial conditions it could not pay its debts as they became due and was being hard pressed by its creditors, and he asked for the appointment of a receiver (Trans. pp. 159-170). The company immediately appeared and, by answer, admitted the allegations of Towle's complaint and joined in the request for a receiver (Trans. pp. 173-174). Accordingly, on the same day, November 2, 1914, the Court appointed William T. Wallace receiver of the Great Shoshone and Twin Falls Water Power Company. (Trans. pp. 170-173). The order appointing the receiver forbid and enjoined any creditor or any one else from attaching, levying upon, or seizing any of the property of the Great Shoshone and Twin Falls Water Power Company (Trans. p. 172).

The Company was a public service corporation furnishing electricity to numerous towns in Southern Idaho.

On April 14, 1915, The Equitable Trust Company of New York commenced an entirely separate and distinct action in the above court and filed its complaint seeking to foreclose a deed of trust or mortgage dated May 1, 1910, and two supplemental mortgages given to secure an issue of bonds of the Great Shoshone and Twin Falls Water Power Company. The bond issue aggregated $2,230,000.00. The Equitable Trust Com-

pany of New York named as defendants in this foreclosure suit the Great Shoshone and Twin Falls Water Power Company, the mortgagor; William T. Wallace, Receiver; Guy I. Towle, who had theretofore filed the complaint in the receivership suit; and Carl J. Hahn, as administrator of the estate of Harry M. King, deceased. The last named defendant was a judgment creditor of the Great Shoshone and Twin Falls Water Power Company whose judgment was on record (Trans. p. 26).

It should be noticed, that the Equitable Trust Company did not ask for the appointment of a receiver, nor did it ask that the receiver in the Towle case, theretofore brought, should be considered as taking possession or holding possession for the trustee or mortgagee.

The deed of trust, which is a mortgage under our Idaho statutes, and the supplemental mortgages sought to be foreclosed purported to cover all of the property of the mortgagor corporation, personal as well as real (Trans. p. 45). But the deed of trust and supplemental mortgages as shown by the complaint and as is admitted, lacked the affidavit of good faith on the part of the mortgagor without which a mortgage of personal property is void as against creditors under section 3408 of the Idaho Revised Codes reading as follows:

"AFFIDAVIT AND RECORD OF MORTGAGE.

Sec. 3408. A mortgage of personal property is void as against creditors of the mortgagor and subsequent

purchasers and incumbrances of the property in good faith and for value, unless:

First: It is accompanied by the affidavit of the mortgagor that it is made in good faith and without any design to hinder, delay or defraud creditors.

Second: It is acknowledged or proven, as grants of real estate, and the mortgage ,or a true copy thereof, is filed for record with the county recorder of the county where such property is located and kept."

Neither had the mortgage or a true copy thereof been filed for record or indexed as a mortgage of personal property with the county recorders of the counties where the property was located and kept, as a mortgage of personal property as required by the same section and section 3409 of the Idaho Revised Codes (Trans. pp. 175-176).

It later developed that some of the personalty of the Great Shoshone and Twin Falls Water Power Company such as generators, dynamos, switchboards, and tools and supplies necessary for the operation and maintenance of the system, constituted essential parts of the mortgagors' generating, transmitting, and distributing system and the lower court held that the above Idaho statutes relating to mortgages of personal property had no application to such classes of personalty. But, on the other hand, the trial court held that the Idaho chattel or personalty mortgage statutes did apply to such articles of personalty as did not form constituent parts of the mortgagor's system, or were not presently necessary for its maintenance or operation, such, for example, as

stocks of merchandise kept in its various stores which were intended for sale to the public in the ordinary course of retail trade, bank balances, accounts receivable, and tools, materials ,and supplies in excess of present needs. (Trans. 185-187).

On May 4, 1915, the defendants, the Great Shoshone and Twin Falls Water Power Company and William T. Wallace, Receiver, filed separate appearances in the mortgage foreclosure suit brought by the Equitable Trust Company of New York, but made no answer to the bill of complaint.

It should be remembered that the deed of trust and supplemental mortgages, though not executed and recorded as required by law, were valid between the mortgagor and mortgagee as to all personal property attempted to be mortgaged, and also valid against all the world until attacked by some creditor.

On October 16, 1916, L. M. Plumer and E. B. Scull, as executors of the estate of L. L. McClelland, deceased, and within the next few days thereafter, Jake M. Shank and Guy I. Towle proved their claims in the lower court in the receivership suit entitled Guy I. Towle, plaintiff, vs. Great Shoshone and Twin Falls Water Power Company, defendant, being equity suit No. 509 and being the same suit in which William T. Wallace was on November 2, 1914, appointed receiver, and each procured an order of the court setting forth that upon the hearing of their respective claims, it was admitted by the receiver appearing in person and by his attorney that the claims set forth by the respective claimants above

named appeared upon the books of the Great Shoshone and Twin Falls Water Power Company as valid and existing claims against that company, and thereupon the court duly and regularly allowed said claims in the sums as hereinafter set forth, to wit:

Guy I. Towle	$13,963.01
Carl Hahn as administrator of the estate of Harry M. King, deceased	6,225.15
L. M. Plumer and E. B. Scull as executors of the estate of L. L. McClelland, deceased	15,625.00
Jake M. Shank	4,390.00

(Trans. pp. 226-227).

Thereafter, on October 23, 1915, L. M. Plumer and E. B. Scull, as executors of the estate of L. L. McClelland, deceased, and Jake M. Shank petitioned to intervene in this action on behalf of themselves only and to set up certain defenses relating to the form, execution, and recording of the deed of trust and supplemental mortgages, which defenses these interveners believed to be valid, and which they believed would entitle them to prior liens over the lien of the deed of trust and supplemental mortgages of the Equitable Trust Company of New York in certain personal property of the Great Shoshone and Twin Falls Water Power Company. Their petitions set forth that their claims had been duly and regularly approved and allowed in the receivership suit as above stated; that there was no other property excepting that sought to be held by the Equitable Trust Company of New York under its deed of trust and

supplemental mortgages out of which their claims could possibly be satisfied; that they were forbidden by the order of the court appointing the receiver from attaching that property; that they had exhausted heir legal remedies and had procured the only thing in the nature of a judgment that it was possible for them to secure, and that unless they were allowed to intervene and have their claims settled out of this property their claims would be valueless (Trans. pp. 107-110, 131-134). The defenses sought to be interposed by the interveners, as already stated, were based on the fact that though the deed of trust and mortgages sought to be foreclosed purported to be mortgages of personal as well as real property, yet they did not have the affidavit of good faith made by mortgagor as required by the Idaho statutes nor were they filed or indexed as mortgages of personal property (Trans. pp. 109-110). The court allowed the intervention of the two above named claimants (Trans. pp. 111, 135). These two claimants then, together with two original defendants in the foreclosure suit, namely, Guy I. Towle, whose claim had likewise been duly approved and allowed in the receivership suit, and Carl J. Hahn as administrator of the estate of Harry M. King, deceased, duly and regularly filed and served their separate answers in this foreclosure case, answering for themselves, respectively only and individually, each setting up the aforesaid defenses to the deed of trust and supplemental mortgages (Trans. 111-129, 135-139, 102-106).

On October 25, 1915, the cause came regularly on

for trial before the court sitting in Equity on the Bill of Complaint and Supplemental Bill of Complaint of the Equitable Trust Company of New York and the issues made thereon by the answers of Guy I. Towle and Carl J. Hahn as administrator of the estate of Harry M. King, deceased, defendants, and the answers of L. M. Plumer and E. B. Scull as executors of the estate of L. L. McClelland, deceased, and Jake M. Shank, interveners (Trans. p. 141).

The Court overruled the motions of the Equitable Trust Company of New York to strike out the answer of Guy I. Towle, and to vacate the orders made by the Court theretofore on October 23, 1915, allowing L. M. Plumer and E. B. Scull as executors of the estate of L. L. McClelland, deceased, and Jake M. Shank to intervene and be made parties defendant in this cause, and to dismiss the petitions and to strike the answers of said interveners L. M. Plumer and E. B. Scull, executors, and Jake M. Shank (Trans. p. 141). The Equitable Trust Company of New York assigns these rulings of the lower court as error (Trans. 253-254, Specifications of Error 7-14).

Thereupon the allegations in the answers of these defendants and interveners were by agreement of counsel in open court deemed denied. (Trans. p. 141).

The receiver who was present in open court with his counsel had not up to this time, October 25, 1915, filed any answer nor indicated any desire or intention of doing so. Counsel for the Receiver stated to the court that the receiver took a neutral position in the

controversy between the Equitable Trust Company New York and the four attacking creditors, and for that reason he had filed no answer. The court then directed the receiver to prepare an answer and file the same by 10:00 A. M. of October 26, 1915. (Trans. 141-142).

The complainant then began introducing its testimony which was mainly in the form of depositions taken in New York City.

Albert E. Smith testified in his deposition that he was the treasurer of the National Securities Corporation; that the National Securities Corporation was the absolute owner of all the outstanding bonds of the Great Shoshone and Twin Falls Water Power Company, having purchased them in June, 1915, from a protective committee for holders of notes of the Great Shoshone and Twin Falls Water Power Company, which committee consisted of Alvin W. Krech, A. C. Robinson, A. M. Imbrie, and H. Hobart Porter. (Trans. 143-144).

The witness did not state how much had been paid for the bonds.

Samuel Armstrong testified that he was assistant secretary of the complainant; that the complainant had been requested to declare the bonds of the Great Shoshone and Twin Falls Water Power Company due and had been requested to foreclose the deed of trust and supplemental mortgages by instruments in writing signed by the then owners of the bonds. This was before the institution of the foreclosure proceedings in April, 1915. Among those who signed such written

request was the appellant, American Water Works and Electric Company by its president, H. Hobart Porter. (Trans. p. 150).

On October 26, 1915, the receiver, the defendant William T. Wallace filed his answer in this foreclosure suit. But he did not see fit to set up the defenses which the four attacking creditors in their respective answers had asserted, nor did he see fit, on behalf of the general creditors who appeared through him only, to attack the trust deed and supplemental mortgages of the Equitable Trust Company on the grounds set up by the four attacking creditors nor on any other grounds, nor did he, though present in open court at the trial with his attorney ever ask leave to amend his pleadings so as to set up there defenses to the trust deed and supplemental mortgages (Trans. pp. 81-87).

Before the Equitable Trust Company rested and closed its case, and upon the coming in of the court on the morning of October 27, 1915, Mr. P. B. Carter, an attorney at law, stated to the court that a telegram had come o his office at 3:50 P. M. of October 26, 1915, the evening before, from H. Hobart Porter, president of the Great Shoshone and Twin Falls Water Power Company, requesting him to file an answer in the case on behalf of the Great Shoshone and Twin Falls Water Power Company admitting all the allegations of the foreclosure bill and supplemental bill. Mr. Carter further stated that he had prepared an answer in pursuance of the telegram from H. Hobart Porter and desired leave to file the same. The court took the

application under advisement and suggested that the proposed answer be lodged with the clerk. The proposed answer read as follows:

> "Comes now the defendant, the Great Shoshone and Twin Falls Water Power Company, one of the defendants in the above entitled action, and answering the bill of complaint and supplemental bill of complaint, admits each and every allegation of said bill of complaint and supplemental bill of complaint as therein set forth or specified." (Trans. pp. 174-175).

H. Hobart Porter, who sent the above telegram directing his attorney to file this answer admitting all the allegations of the foreclosure bill and supplemental bill was at that time, and still is, the president of the appellant American Water Works and Electric Company. (Trans. pp. 150, 315).

The incident of the sending of this telegram by H. Hobart Porter, president of the American Water Works and Electric Company undoubtedly occupied a prominent place in the mind of the trial judge when considering the belated petition of the American Water Works and Electric Company to intervene in this cause. About two and one-half months after the trial, after the decree of foreclosure had been entered, after the sale had been held, and when the proceeds were about to be distributed, and after the four attacking creditors thinking no one else was interested had stipulated that the value of the particular property upon which they had been given a prior lien was only equal to the amount of their claims, to-wit, $45,000.00, the American Water Works and Electric Company sought to

intervene and share pro rata with its claim of $1,268,-434.66 with the four attacking creditors in the fund of $45,000.00 which these four creditors had secured for themselves only. In the petition of the American Water Works and Electric Company to intervene presented on February 28, 1916, H. Hobart Porter, who verified the petition, in order to excuse its laches sought to give the court the impression that he did not know that any foreclosure proceedings were pending, or that any trial was being held or that any fight was being made by any creditors upon this deed of trust and supplemental mortgages. The American Water Works and Electric Company at that time owned no bonds of the Great Shoshone and Twin Falls Power Company but alleges that it held a claim against that company for $1,268,434.66. By the language of its petition to intervene and proposed complaint the American Water Works and Electric Company further seemed to wish the lower court to infer that it would have united with the attacking creditors if it had but known what was going on. (Trans. p. 277, 279, Pars. 9 and 13). Facts already in the record and circumstances known to the court led Judge Dietrich to decide that H. Hobart Porter and the American Water Works and Electric Company had full knowledge of everything taking place in these foreclosure proceedings, and that instead of aiding the creditors attacking the mortgages and deed of trust, they had chosen to join hands with the Equitable Trust Company of New York in an effort to prevent the freeing of any of this personal

property from the lien of the deed of trust and supplemental mortgages (Trans. 302-310). This petition of the American Water Works and Electric Company to intervene and the facts surrounding it will be outlined later.

On defendants' and interveners' side of the case at the trial, Carl J. Hahn, on his own behalf, introduced a certified copy of his unpaid judgment against the Great Shoshone and Twin Falls Water Power Company. The Equitable Trust Company of New York, complainant, then admitted by its counsel in open court that the claims of Jake M. Shank in the sum of $4390.00, of Guy I. Towle in the sum of $13,963.01, and of L. M. Plumer and E. B. Scull, executors, in the sum of $15,625.00 had been allowed and approved as claims against the Great Shoshone and Twin Falls Water Power Company in the receivership suit, and also admitted that their deed of trust and supplemental mortgages though purporting to cover personal as well as real property, had not been filed or recorded as mortgages of personal property, nor filed in the chattel mortgage records of the counties where the property was located and kept. (Trans. pp. 175-176).

And thus the trial ended. The court took the case under advisement and on November 17, 1915, rendered its decision. Only the second point discussed in the court's decision is material on this appeal. It reads as follows:

(Title of Court and Cause.)
Nov. 17, 1915.
In Equity No. 526
Decision.

Dietrich, District Judge:

Two general questions are presented: (1) For what amount is plaintiff entitled to foreclosure and (2) upon what property? * * * *

The second question arises out of the fact that the trust deed, which, under the laws of the state, is to be deemed a mortgage, is executed with the formalities only of a real estate mortgage, and is without certain requirements for, and is not recorded as, a chattel mortgage. By intervening creditors and by the receiver it is urged that as to the personal property which the instrument purports to cover, it is void; or perhaps, speaking more accurately, it is to that extent ineffective as against the claims of other creditors. In support of this view reliance is placed upon Section 3408 of the Idaho Revised Codes, which declares that: "A mortgage of personal property is void as against creditors of the mortgagor * * * unless * * * it is accompanied by the affidavit of the mortgagor that it is made in good faith," etc. Admittedly no such affidavit was attached to or accompanies the trust deed. Against this defense the first point raised by the plaintiff is, that neither the intervening creditors nor the receiver is competent to interpose it. The argument is that the receiver stands in the shoes of the debtor, and can make no defense unavailable to it, and that the instrument being undoubtedly valid as between the mortgagee and the mortgagor, is valid as between the mortgagee and the receiver. And further, that the intervening creditors having no judgment or other lien upon, or interest in, any of the property, are without standing as parties, and cannot be heard to

question the validity of the mortgage. It must be conceded that as a rule a general creditor without interest in or a lien upon mortgaged property cannot intervene in a foreclosure suit or challenge the sufficiency of the mortgage. But here, it is to be observed, a creditors' suit was brought long before the institution of the foreclosure suit, and a receiver was appointed therein to take charge of all of the mortgagor's property. In that suit the claims of these creditors were offered, allowed, and filed, as valid subsisting claims against the estate. In Chemical National Bank vs. Armstrong, 59 Fed. 372, 375, where a receiver had been appointed to take charge of the assets of an insolvent bank, Judge Taft, delivering the opinion of the court, said:

"It is manifest that it would utterly defeat the object of the banking act if, after the suspension, the assets remained subject to levy, execution, or attachment and, therefore, that the passing of the assets into the hands of the receiver removes all the property of the bank from liability to process to secure satisfaction of judgments. Bank v. Colby, 21 Wall. 609.

"The right which a creditor of the bank had before suspension of levying an execution to satisfy his judgment is gone, and for it is substituted a fixed and definite interest in the assets as a security for the payment of his debt, which it is the purpose of the banking act to reduce to money, and apply on his debt, with all convenient speed."

Referring to this case, the Supreme Court of the United States, speaking through Mr. Chief Justice Fuller, in Merrill v. Bank, 173 U. S. 131, 136, said:

"This was in accordance with the decision of the Circuit Court of Appeals for the Sixth Circuit, in Chemical National Bank v. Armstrong, 16 U. S. App. 465. Mr. Justice Brown, Circuit

Judges Taft and Lurton, composing the court. The opinion was delivered by Judge Taft, and discusses the question on principle with a full citation of the authorities. We concur with that court in the proposition that assets of an insolven debtor are held under insolvency proceedings in trust for the benefit of all his creditors, and that a creditor, on proof of his claim, acquires a vested interest in the trust fund."

Recognizing the same principle, the Supreme Court of California, in Ruggles v. Cannedy, 127 Cal. 290, gave it specific application to conditions analagous to those here presented. It is there said:

"In this case, the creditors had not obtained judgments against the mortgagor, nor indeed had they instituted any proceedings against him at the time he was adjudged an insolvent. After that judgment by force of the insolvency act itself, they were prevented from restoring to any proceeding in law or equity for such purpose. They were limited to the presentation of claims in the insolvency court. This they did, and when those claims were allowed and approved the questions involved in them became *res adjudicata.* The presentation, allowance and approval of the claim, while not in strictness a judgment, had much of the force and effect of a judgment, and was the only thing in the nature of a judgment which creditors so situated could obtain. For the purpose of enforcing their rights against fraudulent or void acts of the insolvent, it is the equivalent of a judgment. (Roan v. Winn, 93 Mo. 503)."

Only by giving effect to such principle can great injustice be avoided, for otherwise, at the suggestion and with the encouragement of the trustee, a general creditor could bring such a suit as was here brought, and secure the

question the validity of the mortgage. It must be conceded that as a rule a general creditor without interest in or a lien upon mortgaged property cannot intervene in a foreclosure suit or challenge the sufficiency of the mortgage. But here, it is to be observed, a creditors' suit was brought long before the institution of the foreclosure suit, and a receiver was appointed therein to take charge of all of the mortgagor's property. In that suit the claims of these creditors were offered, allowed, and filed, as valid subsisting claims against the estate. In Chemical National Bank vs. Armstrong, 59 Fed. 372, 375, where a receiver had been appointed to take charge of the assets of an insolvent bank, Judge Taft, delivering the opinion of the court, said:

"It is manifest that it would utterly defeat the object of the banking act if, after the suspension, the assets remained subject to levy, execution, or attachment and, therefore, that the passing of the assets into the hands of the receiver removes all the property of the bank from liability to process to secure satisfaction of judgments. Bank v. Colby, 21 Wall. 609.

"The right which a creditor of the bank had before suspension of levying an execution to satisfy his judgment is gone, and for it is substituted a fixed and definite interest in the assets as a security for the payment of his debt, which it is the purpose of the banking act to reduce to money, and apply on his debt, with all convenient speed."

Referring to this case, the Supreme Court of the United States, speaking through Mr. Chief Justice Fuller, in Merrill v. Bank, 173 U. S. 131, 136, said:

"This was in accordance with the decision of the Circuit Court of Appeals for the Sixth Circuit, in Chemical National Bank v. Armstrong, 16 U. S. App. 465. Mr. Justice Brown, Circuit

Judges Taft and Lurton, composing the court. The opinion was delivered by Judge Taft, and discusses the question on principle with a full citation of the authorities. We concur with that court in the proposition that assets of an insolven debtor are held under insolvency proceedings in trust for the benefit of all his creditors, and that a creditor, on proof of his claim, acquires a vested interest in the trust fund."

Recognizing the same principle, the Supreme Court of California, in Ruggles v. Cannedy, 127 Cal. 290, gave it specific application to conditions analagous to those here presented. It is there said:

"In this case, the creditors had not obtained judgments against the mortgagor, nor indeed had they instituted any proceedings against him at the time he was adjudged an insolvent. After that judgment by force of the insolvency act itself, they were prevented from restoring to any proceeding in law or equity for such purpose. They were limited to the presentation of claims in the insolvency court. This they did, and when those claims were allowed and approved the questions involved in them became ***res adjudicata.*** The presentation, allowance and approval of the claim, while not in strictness a judgment, had much of the force and effect of a judgment, and was the only thing in the nature of a judgment which creditors so situated could obtain. For the purpose of enforcing their rights against fraudulent or void acts of the insolvent, it is the equivalent of a judgment. (Roan v. Winn, 93 Mo. 503)."

Only by giving effect to such principle can great injustice be avoided, for otherwise, at the suggestion and with the encouragement of the trustee, a general creditor could bring such a suit as was here brought, and secure the

appointment of a receiver,, and the property having thus been placed in *custodia legis*, other general creditors would be prevented from acquiring specific liens thereon through the levy of attachment or execution process, with the result that they would be disabled from attacking an invalid mortgage, while the trustee, taking advantage of their disability, could rest secure until, upon the maturity of its right to foreclose, it could appropriate the entire property to the discharge of its claim, notwithstanding the defect in its mortgage. It will therefore be held that the creditors were properly permitted to intervene, and that they have an interest which entitles them to challenge the mortgage.

The further contention is made by the trustee that the provisions of the chattel mortgage statutes of the state are not applicable to property such as is here involved, for the reason that while some of it, considered separately, falls within the definition of personal property, it is all to be deemed a single indissoluble unit because of its necessary relation to the public purpose to which it is devoted. Within certain limits the view finds support in Hammock v. Farmers Loan & Trust Co., 105 U. S. 77, and Farmers Loan & Trust Co. v. Detroit, etc. R. R. Co., 71 Fed. 29 See also Jones on Corporate Bonds and Mortgages, (3d Ed.) Section 1377 et seq. While this is not a railroad property, it is devoted to the public service, and I am inclined to think is subject to the same considerations which were regarded as controlling in these cases; in the absence of a decision of the Supreme Court of the state to the contrary I shall therefore apply the principle which they establish to the determination of the issue here. It may be added that the decisions of the state courts, where there are no controlling statutes, are wanting in

harmony, with the weight probably against the view here adopted.

Complying with the suggestion made at the hearing, counsel for the intervenors have incorporated in their brief a schedule in which specifically or generally they have inventoried what they deem to be personal property. By Section 3054 of the Idaho Revised Codes, real property or real estate is defined as embracing lands, mining claims, possessory rights to lands, ditch and water rights, and everything affixed or appurtenant to lands. Under this definition it is not apparent how the several water rights included in the list can be held to be personal property. But however that may be, they clearly fall within the principle of the Hammock case. So also do franchises, and such items as generators, dynamos, switch boards, and other articles of equipment constituting essential parts of the mortgagor's generating, transmitting, and distributing system; also tools, implements, and materials, teams and conveyances, presently necessary for the maintenance, repair, and operation of the system.

The principle, however, does not extend to supplies, materials, and tools in excess of present needs; to bills or accounts receivable; to cash on hand or bank balances; to stocks of merchandise which are intended for sale to the public in the ordinary course of retail business; and apparently not to the capital stock of the Jerome Water Works Company, or to the public ferry at Shoshone Falls; nor, generally speaking, to such articles of personalty as do not form constituent parts of the system, or are not presently necessary to its maintenance and operation—as to all of which the claims of the interveners will be recognized as being superior to the lien of the mortgage. The other property will be sold as a single parcel, but these items upon which it is held the creditors have a su-

perior lien will be sold separately. Either party may, upon notice, introduce further evidence, at a date to be stated in the notice, prior to December 10, 1915, for the purpose of more completely identifying the property embraced in this latter class." (Trans. pp. 177, 181-187).

In accordance with the views expressed in the decision, a decree of foreclosure was entered on December 6, 1915, declaring that the lien of the deed of trust and supplemental mortgages was subject and subordinate to the claims of the four creditors who had attacked this trust deed and supplemental mortgages in the foreclosure suit "as to all such articles of personalty as do not form a constituent part of and are not presently necessary for the maintenance, repair, and operation of the hydro electric generating, transmitting, and distributing systems of the Power Company or reasonably necessary in conducting its business as a public service corporation, such personalty consisting of construction supplies and materials in excess of the present needs of the Power Company in conducting its business, and of bills and accounts receivable, stocks of merchandise which are intended for sale to the public in the ordinary course of retail business, the public ferry at Shoshone Falls, and stock owned by the Power Company in other Corporations." (Second Paragraph Decree, Trans. pp. 191-192).

It had been stipulated that all the property of the debtor company might be sold as a single parcel and the Decree so provided (Trans. pp. 187-188, 196).

After the decree had been entered and before the sale, the question arose as to how should be determined the value of the particular personal property upon which the four attacking creditors had been decreed to have liens superior to that of the mortgagee. It appeared that the claims of the four attacking creditors aggregated approximately $41,000.00 and it further appearing that $45,000.00 would be sufficient to pay their claims with interest, they entered into a stipulation on December 24, 1915, with the Equitable Trust Company of New York to the effect that the propery upon which they were adjudged to have claims prior and superior to the lien of the Equitable Trust Company of New York was of the reasonable value of $45,000.00 (Trans. pp. 210-212), and an order of the court was on December 27, 1915, made that $45,000.00 of the proceeds of the sale of the mortgagors property should be placed in the separate fund mentioned in the Decree to pay the claims of the four attacking creditors.. (Trans. pp. 212-213).

On January 8, 1916, all the property of the Great Shoshone and Twin Falls Water Power Company was sold at public sale under the decree of foreclosure and bid in for the sum of $2,000,000.00, the upset price theretofore fixed by the court. (Trans. pp. 215, 216).

On February 14, 1916, the motion for confirmation of the sale came on for hearing and an order was thereafter made confirming the sale. (Trans. pp. 215-223).

On the same day, February 14, 1916, the American Water Works and Electric Company, appellant, for the first time appeared in court, professing ignorance of what had been happening theretofore in the cause, and petitioned to intervene in this foreclosure suit, not for the purpose of attacking the deed of trust or supplemental mortgages nor for the purpose of wresting any more property from the mortgagee nor for the purpose of establishing that the lien of the deed of trust and supplemental mortgages was subordinate to their claim, but for the sole purpose of depriving the four attacking creditors of the fruits of their litigation and of pro-rating with these four creditors in the fund of $45,000.00, which the court had by its decree of December 6, 1915, declared should be paid over to the four creditors who had made the attack upon the deed of trust and supplemental mortgages. The alleged claim of the American Water Works and Electric Company amounted to $1,268,434.66; the aggregate of the claims of the four attacking creditors amounted approximately to $41,000.00. Thus, under its proposed pro-rating plan, the American Water Works and Electric Company sought to obtain for itself about ninety-six and one-half per cent of the fund which the four attacking creditors had won as the result of their diligent efforts. (Trans. 270-285).

After argument upon this petition of the American Water Works and Electric Company to intervene the Court suggested that, without full consideration of the rights of the applicant, its petiion

would be denied in the form in which it was then presented, and further that the application would again be entertained upon a showing touching the diligence of the applicant, and an explanation of its apparent laches in seeking to intervene at such a late date when its president and officers must have known of the pendency of the foreclosure suit since its inception in April, 1915, and upon a further showing concerning the ownership of its claim and the interests, direct and indirect, which the parties to the litigation had and had had therein, and an explanation as to why it was it had not aided but had rather obstructed the four attacking creditors in their efforts to establish a lien superior to the lien of the deed of trust and supplemental mortgages. (Tr. p. 303).

Thereafter the American Water Works and Electric Company amended its petition to intervene and the same came on for hearing on the 28th day of February, 1916. At the same time was also heard the petition of the four attacking creditors for an order upon the special master in chancery to pay to them the amounts of their respective claims out of the funds in his hands under the decree, derived from the sale of the particular personal property upon which it had been decreed that these creditors had claims or liens superior to that of the deed of the funds in his hands under the decree. (Tr. p. 240).

The court granted the petition of the four attacking creditors and made an order directing the special master to pay the four creditors their claims out of

the funds in his hands under the decree .(Tr. p. 240).

At the same time, Feb. 28, 1916, the court denied the petition of the American Water Works and Electric Company to intervene. Thus the American Water Works and Electric Company never became a party to this foreclosure suit. On the same day the court wrote a memorandum decision giving its reasons for not allowing the American Water Works and Electric Company to intervene. The sum and substance of the reasons given by the court is that the petition of the American Water Works and Electric Company to intervene failed to show any equitable grounds upon which it should be allowed to intervene. The memorandum decision is as follows:

(TITLE OF COURT AND CAUSE).

"The interveners to whom a prior lien was awarded by the decree present an application for an order requiring the purchaser at the sale to pay into the hands of the special master a sufficient additional amount to cover their claims, and for a further order directing the Master to pay the claims in full.

On the 14th day of February, the American Water Works and Electric Company, through its counsel, Messrs. Wyman & Wyman, presented an application to intervene, for the purpose of resisting payment to the interveners, and after argument the suggestion was made from the bench that without full consideration of the rights of the applicant its petition would be denied in the form in which it was then presented,

and further that the application would again be entertained upon a showing touching the diligence of the applicant, and especially touching the ownership of the claim, and the interests, direct and indirect which parties to the litigation have and have had therein. It seems that no time was fixed for making such showing, but upon notice from the interveners that they would present the application herein referred to upon this day, it was suggested to counsel for the American Water Works and Electric Company that in order to avoid delay it might present its amended petition to intervene at the time fixed for the interveners' application, and that if the same could not be verified before such time, the verification might be made later and be considered as having been made as of this day. Accordingly the unverified amended petition has been submitted and is entertained, together with the intervener's application. A decision was announced from the bench at the close of the argument, granting the application of the petitioners and denying that of the American Water Works and Electric Company, and the views expressed at the former hearing and at the close of the argument today are hereinafter set forth with some amplification, in order that they may be of record.

Admittedly the interveners are entitled to the relief prayed for, unless the American Water Works and Electric Company, hereinafter called the petitioner, is entitled to intervene, and to take from them substantially all of the fruits of their litigation. It did not seek to intervene until the hour set

for the confirmation of the sale, at which time but for its appearance it would have been proper to make the order for which the interveners now pray. In view of the lateness of the application and the impression I had received in the course of the administration of the estate that there was a community of interest, if not a common ownership, as between the holder of all of the bonds and the holder of this claim, it was thought proper to require the petitioner to make a prima facie case showing that it was not guilty of laches, and that it had not been co-operating with the plaintiff in the action in resisting the relief granted to the interveners. While in the decision today I have placed special emphasis upon another consideration, the showing made by the amended petition upon the point suggested is not very satisfactory. The petitioner might be the technical owner of the claim, and yet all of the stock might be held by the owner of the bonds, and hence I before suggested that in explaining the ownership of the claim the ownership of the stock of the petitioner should also be disclosed. It appears from the record in the case that during the entire time of the pendency of the foreclosure suit all the bonds were held by the National Securities Corporation, and it now appears from the amended petition that there was some sort of an arrangement between that company and the petitioner for the purchase of this claim. In view of the record in the receivership and in this case, it is thought to be incumbent upon the petitioner, before it can ask the court to exercise a

liberal discretion in its favor, fully and frankly to negative the proposition that it stood with the holders of the bonds in the attempt to defeat the interveners in procuring the relief, whereas now it seeks to appropriate to itself substantially all that they have succeeded in wresting from the bondholders, at their own expense and peril.

But be that as it may, I have been unable to see any substantial ground upon which the right of the petitioner to intervene may be predicated. When the matter was first presented to me on the 14th of February I had the impression that while it would not be permitted to intervene to share pro rata in the decree, the intervention might be allowed for another purpose. To explain, there is a fund, the precise amount of which has not yet been determined, in the hands of the receiver in the creditors' suit, which presumably will ultimately be distributed to the unsecured creditors, including the interveners and the petitioner,—and also the plaintiff trustee for such deficiency judgment as may be awarded to it after applying the proceeds of the sale to the liquidation of its claim. My thought was that by paying the $45,000.00 to the intervenors the proceeds of the sale would be diminished by that amount, and therefore the deficiency judgment would be correspondingly increased ,and the aggregate of the unsecured claims entitled to share in the receivership fund would be equally increased, and thus the petitioner would receive a smaller dividend than would have been distributed to it if the interveners had stayed

out of this suit. It occurred to me that perhaps it could be properly held,—although that seemed extremely doubtful,—that a duty rested especially upon Towle, the plaintiff in that action, and possibly upon other interveners, not to do anything even in another suit by which they would be benefited to the disadvantage of other creditors. But whether such was or was not thei rduty, upon reflection it no wappears clear to me that the petitioner would not suffer the slightest prejudice even in this respect. Indeed it is practically conceded by counsel that the petitioner's position is precisely the same, and the share it will receive out of the funds in the hands of the receiver is precisely the same, that it would have been had the interveners never come into the foreclosure suit. The aggregate of the claims to participate in the distribution of that fund will not be increased, because in so far as the deficiency judgment is increased the claims of these interveners will be diminished. So that the aggregate will remain precisely the same. Even if therefore it be assumed that for some reason not made clear the interveners owed the petitioner the duty to take no action which would prejudicially affect its distributive share in the receivership fund, it cannot invoke the principle of equitable estoppel here as a ground for intervening, because admittedly it has suffered and will suffer no injury. The intervenors have done nothing against good conscience or to the prejudice of the petitioner in securing and appropriating to their own use the judgment in the foreclosure case. They were under

no contractual obligations to the petitioner, and I am unable to perceive how it can be held that they have violated any duty or obligation in seeking payment of their claims out of a fund which in whole would have otherwise have gone to the bondholders, and not at all to the unsecured creditors. The judgment is entirely the fruit of their diligence, in the exercise of which they took nothing from the petitioner. The petitioner had the same right as they to come into the suit, of the pendency of which it undoubtedly had knowledge. If it did not join hands with the plaintiff to defeat the interveners, still having knowledge of the pendency of the foreclosure suit, and presumably being advised of its legal rights, it chose to remain silent and inactive, thus avoiding the expense and peril of litigation, until after these intervenors have succeeded, and then, when they are about to receive the fruits of their diligence, it seeks to step in and seize the same. It intimates no reason why, though having knowledge that the plaintiff trustee was seeking to appropriate the entire assets of its debtor to the payment of the bonds, it never lifted a finger in resistance, or suggested that the receiver do so.

The record does not disclose what the real value of the property is upon which the intervenors were awarded a first lien; it may have been very much in excess of the aggregate of their claims. They entered into a stipulation with the plaintiff, agreeing upon a value which was sufficient, but only sufficient, to take care of their claims in full. Had it been known

that other creditors would seek to share in such lien it is possible that a much greater value could have been established, but so far as appears the petitioner gave no notice of its intention to assert the present claim until after such stipulation had been entered into. It is further suggested that the receiver might have asserted for all creditors the rights which the court recognized in the intervenors. It is extremely doubtful to say the least, whether the receiver could have secured a footing to assert such rights, even upon behalf of the intervenors whose claims had been allowed in the general creditors' suit. But while the petitioners' claim had been presented, it had never been passed upon or allowed, and it may be questioned therefore whether it fell within the principle of law upon which the recognition of the intervenors' lien in the foreclosure suit was predicated. The trustee earnestly contended that before any one could attack the validity of the chattel mortgage upon the ground relied upon by the intervenors they must show some interest in or lien upon the property; and such undoubtedly is the general rule. How could the receiver have shown such interest in or lien upon the property in behalf of the petitioner? However that may be, upon an examination of the receiver's answer and of the proofs it will be seen that they were not sufficient to justify the court in finding or declaring any lien in favor of the petitioner or any other creditors. Proofs of the existence and status of claims were offered only by the intervenors and only touching their claims. The

court had no basis upon which to declare a lien in favor of the petitioner."

(Signed) DIETRICH, Judge.

(Record, 302-309.)

The appeals herein prosecuted by the Equitable Trust Company of New York and the American Water Works and Electric Company are, of course, separate appeals and raise entirely separate points, but the records have all been made up together and bound in one volume to save expense and for convenience.

The substance of the assignments of error set forth by the Equitable Trust Company of New York is that the court erred in holding and deciding that the lien of their trust deed and supplemental mortgages was inferior and subordinate to the claims and liens of the four attacking creditors in any property whatsoever, and also erred in allowing the two intervening creditors to intervene and attack the deed of trust and supplemental mortgages.

The substance of the assignments of error set forth by the American Water Works and Electric Company is that the court erred in denying its petition to intervene in the foreclosure suit and pro rata with the four attacking creditors in the foreclosure suit in the fund realized from the sale under the decree in the foreclosure suit, which fund, under the decree, was to be used to pay the prior lien claims of these four specified attacking creditors.

The American Water Works and Electric Com-

pany does not appeal from the decree of foreclosure.

The receiver does not appeal from the decree of foreclosure or from any order and is not complaining of the rulings of the trial court in any way.

POINTING OUT ERRORS IN THE STATEMENT OF THE APPELLANT, THE EQUITABLE TRUST COMPANY OF NEW YORK.

There are so many palpably erroneous statements made in the statement of the Equitable Trust Company of New York, that we call attention to the following inaccuracies in its statement in order that a wrong impression may not be caused thereby:

(1) In its brief, on page 7, it asserts that the four prior lien claimants or attacking creditors proved their claims, **ex parte.** This is erroneous. Both the receiver and his counsel were present, and had to admit to the court that the claims set forth by these claimants were true and correct and were valid obligations of the Great Shoshone and Twin Falls Water Power Company. The court thereupon duly allowed these claims in the form of judgments. They were practically the same as judgments and had it not been for the operation of the law the claimants would have been entitled to judgments in name as well as in form.

(See order allowing claim of executors of estate of L. L. McClelland, deceased, Tr. p. 340).

(See order allowing claim of Jake M. Shank. Tr. p. 341).

(See order allowing claim of Guy I. Towle. Tr. p. 342).

The Equitable Trust Company did not make any objection in the trial court to the amount of any of the claims of these four claimants and did not object to the manner of proof and has never objected upon these grounds.

(2) On p. 8 of its brief it is stated that "The motions of the trustee to vacate the order permitting the interveners to intervene and to strike the answers of said interveners and of defendant Guy I. Towle were overruled by the court and the cause came on for trial upon the bill of complaint and supplemental bill and amended bill, and the answers referred to **and the answer** of the receiver. (Rec. 81).

This is erroneous. When the cause came on for trial, the receiver had filed no answer whatever. He was in default and his counsel stated to the court that he had prepared no answer and then, although these four creditors had filed their answers, and served the same on the receiver, setting forth valid points upon which the claimants were given liens on certain personalty prior to the lien of the deed of trust and supplemental mortgages, the receiver did not join any issues whatever in his answer, and either did not want to, that is refused, or neglected to raise the issues set up by these four claimants in their answers.

(Rec. 81-87.)

(3) Five lines from the bottom on page 8 of its brief it states:

> "On October 27, 1915, during the trial of the cause, the defendant power company lodged its answer admitting all the allegations of the bill and supplemental bill. During the trial the interveners, Jake M. Shank, L. M. Plumer and E. B. Scull, and the defendants, Carl J. Hahn, Guy I. Towle and the receiver of the power company made the same objections relative to the recordation and execution of the deed of trust and supplemental mortgages and denied that the trustee had a prior lien on certain personal property of the power company."

This is erroneous. It made this statement on a sentence taken from Judge Dietrich's first decision, but Judge Dietrich corrected this statement in his last decision Tr. p. 309, where he says: "However that may be, upon examination of the receiver's answer and of the proofs it will be seen that they were not sufficient to justify the court in finding or declaring any lien in favor of the petitioner (Am W. W. & Elec. Co.) or any other creditors."

(4) On p. 11 of its brief it states: (7 lines from top of page).

> "The court denied the right of the receiver, as the representative of all the creditors of the Power Company to make the contest made by the particular creditors above named."

This is erroneous. The court did not deny any such right. Even after the way was pointed out to the receiver, and before the receiver had filed his answer, the receiver did not attempt to assert any rights for any creditors. The court had to direct the receiver to file an answer and when the receiver did file the

answer, he raised no issues, although the way had been shown him by which he could have raised the same issues as raised by these four creditors.

(5) On p. 11 of its brief it states: (11 lines from top of page).

> "That the court held that the general creditors who had been allowed to intervene in the foreclosure suit had, by virtue of the general creditor's suit and the filing of their claims in that suit obtained a sufficient interest in the property covered by the mortgage to entitle them to contest the priority of the lien thereof, and a status superior to that of the receiver who was in possession of the property as a representative of all the creditors."

This is erroneous. The court held, that where the receiver had failed and neglected to assert any rights on behalf of creditors at all in the foreclosure suit, though made a defendant by the trustee in the foreclosure suit, and where the receiver had failed and neglected to file any answer at all in the foreclosure suit and had become in default in that suit, that the creditors who had presented their claims in the creditors' suit and had proved their claims in the creditors' suit and whose claims had been allowed in the creditors' suit, could intervene in the foreclosure suit and attack the lien of the deed of trust.

(6) On page 11 of its brief it states: (middle of page).

> "The effect of the Court's ruling was to convert a general creditors' suit wherein equality and pro rata distribution as between creditors

> obtained, into a contrivance by which certain creditors could obtain a preference and priority over the receiver and all other creditors."

This is erroneous. The effect of the ruling of the court upon the general creditors' suit was not to change the general creditors' suit in any manner, shape or form, and nothing whatever was taken from the creditors in the general creditors' suit which they would otherwise have gotten.

The lien of the mortgage was good as between the bond holders and the debtor corporation. So in the foreclosure suit, the trustee would have taken all the property for the satisfaction of the lien.

But four creditors from the general creditors' suit saw an opportunity at the last moment, after the receiver had failed and neglected to represent them, to intervene in the foreclosure suit, an entirely different and distinct suit, and wrest from the mortgagee certain property which otherwise would have gone to the mortgagee, not to the general creditors in the receivership suit.

(7) On page 11 of its brief it states: (last par. on page).

> "The contention of the trustee complainant in the foreclosure suit, was (1)..... and (2) "that if the mortgage was subject to attack for the reasons stated above, the contest should be made by the receiver as representative of all creditors, and the property, or the proceeds thereof, should be turned over to the receiver in the general creditors' suit for equitable distribution."

The above statement is not only absolutely false but it is directly contrary to the position taken by this appellant in the trial court.

Judge Dietrich states in his opinion on page 182 of the transcript: "Against this defense the first point raised by plaintiff is, that neither the intervening creditors **nor the receiver** is competent to interpose it. The argument is that the receiver stands in the shoes of the debtor, and can make no defense unavailable to it, and that the instrument being undoubtedly valid as between the mortgagee and the mortgagor, is valid as between the mortgagee and the receiver."

The appellant surely cannot be allowed to argue and cite authorities to the trial court and urge the trial court to take certain action and then take a contrary view and argue directly contrary in the appellate court and urge a reversal upon a ruling of the court which was counselled, urged and advised by this same appellant.

And as to that part of the statement that the property or the proceeds upon which these four creditors obtained a prior lien should have been turned over to the receiver for distribution in the general creditors' suit, there was no such request made of the trial court. The receiver raised no issues in his answer and made no such request and now, is not attempting to appeal from the decree.

The complainant did not make any such request and only had a general denial entered as to the new matter in the answers of the four claimants. So, on

this appeal, for the first time, do we hear this request and coming not from the receiver, (the receiver is not complaining, not from a creditor, represented as being so numerous, but from the complainant on the theory that it has a deficiency judgment, when as a matter of fact it has no deficiency judgment and has waived its assignment of error on that point. (Tr. p. 176).

It is significant that this appellant does not refer to any page of the record as a basis for this statement.

(8) On page 12 of its brief it states:

> "In the latter event, the trustee would be entitled to its share of the proceeds, based on its deficiency."

This is erroneous and misleading. The trustee waived its deficiency judgment in this case and waived its assignment of error concerning the same. (Tr. p. 176 and 254). Furthermore, this appellant has no deficiency judgment in this case, and its argument to the effect that it would be entitled to pro rate in the general creditors' suit based upon the amount of its deficiency judgment falls flat when this fact appears.

All this appellant is trying to do is to obtain the right of the American Water Works and Electric Company to pro rate, and all its talk about prorating with its deficiency is misleading unless it is remembered that this appellant has no deficiency judgment and is simply using the word, misleading though it is, as an excuse for arguing in favor of pro-

rating, having in mind the claim of its ally the American Water Works and Electric Company.

On page 12 of its brief the appellant states:

> "The following facts are not in dispute:
> (1) * * * * * *
> (2) "That all parties to this cause, excepting, of course, the Power Company and its receiver, have filed their claims with the receiver in the general creditors' suit commenced by Guy I. Towle."

This is erroneous. The complainant, the Equitable Trust Company, has filed no claim with the receiver for a deficiency judgment. It has no deficiency judgment. It failed in its proof so that it was not entitled to a deficiency judgment. It waived its claim for a deficiency judgment. The decree provided for no deficiency judgment. The appellant waived its assignment of error on this point as to a deficiency judgment. (Record p. 176-254).

CONCERNING ASSIGNMENTS OF ERROR OF THE APPELLANT EQUITABLE TRUST COMPANY OF NEW YORK, AS SET FORTH IN ITS BRIEF.

In the transcript, this appellant sets forth fifteen (15) assignments of error, but in the brief this appellant has only six (6), having abandoned nine (9) of their original assignments, and from a perusal of the six (6) now stated anew, it seems that the appellant is attempting to raise points never raised by it before and is attempting to make a point out of the assignment that it should have been allowed to pro

rate in the general creditors' suit with its deficiency from the foreclosure suit, when as a matter of fact it has no deficiency judgment, having failed in its proof so that it was not entitled to a deficiency judgment, and having expressly waived its assignment of error based on its claim for a deficiency judgment. (Tr. p. 176 and 254), and these six assignments of error as now set forth anew in their brief are distorted and some of them not substantially in the form presented to the trial court, for instance, in its first general assignment of error as contained in its brief on p. 13 it says: "1. That the court erred in decreeing that the lien of appellants' mortgage was subject and subordinate to the claims of general creditors, as to certain personal property." This is misleading, in that the trial court did not hold that the lien of appellants' mortgage was subject to claims of general creditors. On the contrary, the court held "that as a rule a general creditor without interest in or lien upon mortgaged property cannot intervene in a foreclosure suit or challenge the sufficiency of the mortgage." (Record 182). But that these particular creditors under the particular circumstances of this case "were properly permitted to intervene and that they have an interest which entitles them to challenge the mortgage." (Record 185).

The general assignment of error No. 3 on p .13 of its brief is misleading in that the court would perhaps infer from its language that this appellant had a deficiency judgment, whereas in truth and in fact it has no deficiency judgment and has filed no claim

for a deficiency judgment in the receivership proceedings though the time for the filing of claims against the debtor company has long since passed, and moreover, appellant has waived its assignment of error number 15, Record pages 176 and 254, which assignment of error was to the effect that the court erred in not rendering judgment in its favor for a specific sum of money. Appellant has waived its right to a deficiency judgment.

In setting forth its general assignment of error No. 4, as shown in its brief on page 14, it fails to call the court's attention to the fact that it waived its assignment of error No. 15 and thereby waived its right to participate in a distribution of the assets of the insolvent debtor, in the receivership suit.

ARGUMENT AND ANSWER TO POINTS AND AUTHORITIES OF THE APPELLANT, EQUITABLE TRUST COMPANY OF NEW YORK.

As to this appellants' **first** point, these appellees say:

That the court did not make any such holding as the one attributed to it by this appellant. The trial court did not hold "that the appointment of a receiver in a general crediors' suit operated to give to creditors filing their claims with such receiver a lien upon the property of the debtor," nor did it hold the reverse of this proposition. The court made no holding upon this proposition. But, instead, the court held that when a creditor petitioned to come into a

foreclosure suit showing that its claim was liquidated; that its debtor was insolvent; that the property covered by the mortgage was the only property out of which the debt could be paid; that the mortgagee was going to take it all to satisfy his claim and that the mortgage was void as to the intervener because not executed and filed as required by law; that the creditor had exhausted all of its legal remedies; and unless it was permitted to intervene, its claim would be rendered absolutely valueless, then, such creditor had such an **interest** in the foreclosure action as would permit the creditor to intervene. All this appeared from the petition for leave to intervene of the intervening creditors. (Record pp. 107 to 110) and from the bill of complaint. This was a proper holding under the Idaho statutes as construed by the Supreme Court of the State of Idaho.

> See Idaho Revised Codes, Sections 4111 and 3418.
>
> Newstadter Bros. vs. Doust, 13 Idaho 617, 92 Pac. 978.
>
> And particularly Union Trust, etc. Bank vs. Idaho Smelting and Refining Co., defendants and respondents, and Title Guaranty & Security Co., intervener and appellant.
>
> 24 Idaho 735, 135 Pac. 832.

The appellees modelled their petition for leave to intervene upon the instructions given by the Supreme Court of Idaho in the last case above mentioned. The case was one in which a creditor was seeking to show that interest required by the statute

of the State of Idaho necessary to permit such creditor to intervene in a foreclosure action, and we submit that these intervening creditors brought themselves within the statute of the State of Idaho as construed by the Supreme Court of Idaho in the above entitled case. Counsel for appellant carefully refrained from mentioning this case in its brief though the same is controlling upon this matter of the interest a creditor must show and the circumstances which must exist to be entitled to intervene in a foreclose action.

This case decided by a unanimous court in October, 1913, declares the following to be the law of the State of Idaho:

> "After the intervener had first shown the existence of its claim" (We did this in the case at bar, Record p. 107-108,) "and it had exhausted all of its large remedies" (We did this in the case at bar. Rec. bottom p. 108, top of p. 109), "or that those remedies were useless and it would be vain to pursue them" (We showed this in the case at bar. Rec. p. 109.) "and that the only way it could secure and collect its claim would be out of the property covered by this mortgage." (We showed this in our petition to intervene. See pars. 4 and 6 Record pp. 109, 110). "Then it would have been in a position to contest the validity of a mortgage, and to raise the question as to whether or not these bonds had been issued and this mortgage had been executed in violation of the provisions of the Constitution of this State or of the State of Washington where this corporation was organized and exists."

As to this appellants second point. Set out on p. 17 of its brief these appellees say: This point has no ma-

terial bearing upon the argument in this case as the statutes and decisions of the State of Idaho do not give the receiver any rights which the Federal Courts are bound to follow in this case.

As pointed out by the case of Union Trust etc. Bank vs. Idaho Smelting & Refining Co. et al, supra, these intervening creditors had the right to intervene in a foreclosure action in Idaho, under the Idaho Statutes, regardless of whether or not a receiver had such right, and even where a receiver had not been appointed.

Appellant seeks to place us in a faulty position, and in one that we have not taken, by continually saying that we based our right to intervene upon the lien caused by the appointment of the receiver in the creditors' suit, or by virtue of the receivership proceedings.

This is erroneous. We had the right to intervene and contest the validity of this mortgage, in Idaho, under the circumstances as shown to exist by our petition to intervene. (See Record pp. 107 to 110). And the fact that a receiver had been appointed was just one of the conditions which were alleged, in the petition for leave to intervene, for the purpose of showing that our legal remedies had been exhausted.

The case of Union Trust, etc. Bank vs. Idaho Smelting & Refining Co., supra, is decisive of this point in Idaho in our favor and this is undoubtedly the reason why appellants' counsel does not mention this case in his brief.

See also Ruggles vs. Cannedy, 127 Cal., 290, 53 Pac. 912.

As to point, No. 3 in appellants' points and authorities on p. 17 of its brief, these appellees say:

This point as set forth by appellant does not correctly state the la wof Idaho. The statute is very simple and reads as follows: "Sec. 3408. A mortgage of personal property is void as against creditors of the mortgagor * * * * * * unless:

1st: It is accompanied by the affidavit, etc.

2d: It is acknowledged ,etc."

The statute does not say that such a mortgage is valid as to all creditors excepting those having a lien upon the property by attachment or some process, as appellant asserts and the decisions of Idaho do not bear him out in this contention but the decisions of Idaho absolutely refute such contentions.

An interest in the matter in litigation and not a lien is the test in Idaho.

Neustadter Brothers vs. Doust, 13 Idaho, 617, 92 Pac. 978, when read with Union Trust, etc. Bank vs. Idaho Smelting & Refining Co., 24 Idaho 735, 135 Pac. 832, shows this to be true. Neustadter Bros. vs. Doust when read with the above case shows that the **interest** referred to, in sections 3418 and 4111 Idaho Revised Codes, does not have to be a **lien** in every case. If the conditions of the particular case are such that the creditor has the equivalent of a judgment or was prevented from having a judgment or lien through no fault of his own, or was entitled to a judgment or

lien for some obstacle over which the creditor had no control, then the creditor will be held in Idaho to have such an **interest** in the subject matter of the litigation as to be entitled to intervene.

Newstadter Brothers vs. Doust, supra, was an action by a general creditor for an injunction against the sheriff brought under a particular statute providing for injunctions in such cases to restrain him from selling certain personal property under affidavit and notice for the sale of such property under a chattel mortgage, and was not an action where a creditor was seeking to intervene and attack a chattel mortgage. A demurrer to the complaint was sustained and judgment of dismissal entered. Plaintiff appealed from the judgment and judgment was affirmed. Thus the only question involved was the sufficiency of the complaint. The court said in its opinion:

> "The complaint is totally defective and wholly insufficient to state a cause of action against the sheriff in this case. The plaintiff makes no attempt to show that Lang and Wunderlich had no other property out of which to pay their indebtedness." (This is totally different from the facts alleged by appellees. Record p. 109.) "It contains no allegation of insolvency nor does it allege any facts from which insolvency can be reasonably inferred." (This is totally different from the facts in our case. Insolvency is alleged in the case at bar. Record 107). "It does not state that the plaintiff has ever made any demand on Lang and Wunderlich for the payment of the debt due, nor does it show any steps taken for the collection of the same." (The facts are exactly opposite in the case at bar. Re-

> cord 108, 109). "They are not made parties defendant in the action against the sheriff nor has plaintiff reduced his claim to a judgment." (Our claim has been adjudicated and allowed. Record 108). "He has commenced no action against Lang and Wunderlich, has never attached this or any other property and in no way connects his right, interest or claim with the property that he seeks to restrain the sheriff from selling and no assurance is given when he will prosecute his action or that he will ever obtain a judgment against them." (Record 108, 109, shows that appellees have prosecuted actions against the debtor company as far as they were permitted to go.) "It can make no difference to the plaintiff whether the sheriff sells this property or not if Lang and Wunderlich pay the plaintiff. If they should have the means to pay their indebtedness to the plaintiff or if they have other property, either merchandise or cash, then there can be no reasonable objection to their paying their other debtor, the Exchange National Bank." (The facts are wholly different in the case at bar. The debtor is insolvent, and has no other property except this property covered by this deed of trust. Record 107-110).

Thus in the case at bar, we alleged every fact the absence of which rendered the complaint totally defective in the foregoing case. Continuing in its decision in the Neustadter case, supra, the Supreme Court of Idaho reviewed the decisions which used various expressions to the effect that those creditors entitled to attack a chattel mortgage must be those either holding "liens upon" or "claims to" or showing an "interest in the subject matter" and then laid down the Idaho rule to be as follows: "It would seem from the foregoing authorities that even if the plain-

tiff had otherwise pleaded a good cause of action he would still not be within the perview of the statute in that he in no way connects himself with an **interest in or claim upon** the property about to be sold. When he prosecutes his action and seeks to enjoin the sheriff from the discharge of his official duty, the plaintiff should be required to state a good cause of action and connect himself with such an **interest** as would entitle him to relief before being allowed to proceed further. Such has not been done in this case and the demurrer was properly sustained."

The Idaho Supreme Court pointed out the distinction in Neustadter Bros. vs. Doust and Union Saving etc. Bank vs. Idaho Smelting and Refining Co. that it was not necessary for a creditor to hold a lien before attacking a mortgage invalid as to creditors but that it was sufficient if the creditor could show a proper **interest** in the subject matter of the suit. And we have shown exactly the kind of an **interest** described in the case of Union Trust etc. Bank vs. Idaho Smelting and Refining Co. supra.

Ryan vs Rogers, 14 Idaho 309, 94 Pac. 427, as cited by appellant, p. 18 of its brief, simply holds that taking possession of the mortgaged property by the mortgagee cures defects in the mortgage.

Martin vs. Halloway, 16 Idaho 513, cited by appellant p. 18 of its brief, holds to the same effect.

The syllabus in the case of Neustadter vs. Doust, supra, was written by the court and it provides that if a general creditor has a **judgment**, he has such an **interest** in the mortgaged property, under certain

circumstances, as to entitle him to intervene and resist the foreclosure of a chattel mortgage; that a judgment creditor without a lien may be an interested party within the meaning of the statute. A judgment is not a lien on personal property in Idaho and if a creditor holding a judgment, may be an interested party and intervene, then a creditor holding the equivalent of a judgment may intervene. There can be no real doubt in any fair mind but that a creditor who has had his claim allowed and approved in receivership or insolvency proceedings has the equivalent of a judgment.

Ruggles vs. Cannedy 127 Cal. 290, says:

> "In this case, the creditors had not obtained judgments against the mortgagor, nor indeed had they instituted any proceedings against him at the time he was adjudged insolvent. After that judgment by force of the insolvency act itself, they were prevented from resorting to any proceeding in law or equity for such purpose. They were limited to the presentation of claims in the insolvency court. This they did, and when these claims were allowed and approved the questions involved in them became **res adjudicata.** The presentation, allowance and approval of the claim, while not in strictness a judgment, had much of the force and effect of a judgment, and was the only thing in the nature of a judgment which creditors so situated could obtain. For the purpose of enforcing their rights against fraudulent or void acts of the insolvent, it is the equivalent of a judgment. (Roan vs. Winn, 93 Mo. 503)."

Counsel for appellant is in error when he says on page 67 of his brief that the reasoning and the quota-

tion which the trial court adopted from Ruggles vs. Cannedy, supra, was based upon the local insolvency statute of California. The California court was careful to point out in its opinion that under the broad and general principles of law creditors holding the equivalents of judgments could attack a chattel mortgage covering the property of an insolvent debtor. And then, the California court went further and ponted out that since the assignee in insolvency by virtue of their local statute represented creditors whose claims had been proved and allowed, the assignee should also be allowed to attack the mortgage.

As to point number 4 on p. 18 of appellants' brief the appellees say:

That section 4111, Idaho Revised Codes, must be taken into consideration in determining whether or not appellees had a right to intervene in a mortgage foreclosure suit. This is the section that relates particularly to intervention and that portion of the section with which we are here concerned reads as follows: "Section 4111. Any person may, **before the trial,** intervene in an action or proceeding, who has an **interest** in the matter in litigation, in the success of either of the parties or an interest against both." This section controls in Idaho where a creditor seeks to intervene in a chattel mortgage foreclosure suit as well as in any other kind of suit. Our State Supreme Court recognized this fact and gave it full force and effect in the case of Union Trust etc. Bank vs. Idaho Smelting and Refining Co., supra. The language used in this last named case is direct in

point as it was a case where this identical point was being discussed. It was a case where a creditor without a lien or attachment was seeking to intervene in a chattel mortgage foreclosure case and contest the validity of the mortgage. It is signifiicant that this case was not even cited in all the numerous cases set out by appellant in its brief. Appellees brought themselves entirely within the rule laid down by the Supreme Court of Idaho in that case, as to the **interest** which creditors should have in the subject matter of the suit.

Thus we see that the case of Horn vs. Volcano Water Company 13 Cal. 62, cited and relied upon by appellant on pp. 18, 60, 63 and 66 of its brief is destructive of the position it takes.

Horn vs. Volcano Water Co., supra, holds directly that:

> "The interest mentioned in the statute which entitles a person to intervene in a suit between other parties must be in the matter in litigation and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment." Justice Field then points out that the California statute was copied from the Statute of Louisiana declaring that "in order to be entitled to intervene, it is enough to have an interest in the success of either of the parties to the suit." Justice Field then quotes with approval from a decision of the Supreme Court of Louisiana in which that court says: "This we suppose must be a direct interest by which the intervening party is to obtain immediate gain or suffer loss by the judgment which may be rendered between the original parties."

Therefore, the test to be applied in the case at bar is; would appellees have obtained "immediate gain or suffered loss" by the judgment to be rendered in the foreclosure suit? This question can be answered only in the affirmative. The mortgage purported to cover all of the property of the common debtor. The debtor was insolvent and had no other property. The decree prayed for requested that all the property be sold to satisfy the lien of the mortgage. The laws of Idaho provide that the mortgage was void as against creditors, but as pointed out by appellant itself, if possession under the mortgage were acquired by a purchaser at the foreclosure sale, no creditor could thereafter take advantage of the defects in the mortgage and appellees' claims would thus become wholly lost and valueless. Is this not "loss" by reason of the judgment to be rendered between the original parties?

The receiver had not answered, setting up the rights of the creditors, though he had had dseveral months in which to do so. The case was set for trial, and the trial date was only a few days off. The rights of the creditors were being neglected. Unless the creditors intervened, the only property from which they might expect the payment of their claims would have been foreclosed upon by the lien of the mortgage and such foreclosure would have bound the receiver and all creditors in the receivership suit. So, it was the duty of the creditors, having knowledge of the default and neglect of the receiver to act for

them, to act for themselves and intervene in the foreclosure suit and protect their rights.

See aso People vs. Green, 1 Iaho 235, at p. 239 and p. 240.

As to point No. 5 set forth by appellant on p. 19 of its brief these appellees say:

First: That this point was not raised by the appellant in the trial court. This appellant argued in the trial court that neither the creditors nor the receiver could attack the deed of trust and set forth in his argument as the reason why the receiver could not attack the chattel mortgage or deed of trust, that the receiver stood in the shoes of the mortgagor; that the mortgage was valid as between the mortgagor and the trustee or bondholders and therefore the receiver could not attack the mortgage or deed of trust.

Second: That the appellant should not be permitted to raise this point for the first time on appeal, especially when appellant urged an exactly opposite position in the trial court.

Third: The receiver, if any one, should raise this point and the receiver is not appealing.

Fourth: This appellant cannot complain that certain assets were not turned over to the receiver for pro rata distribution because this appellant has no deficiency judgment. This appellant has not filed a claim with the receiver for a deficiency judgment. The decree did not provide for a deficiency judgment. The proof was not sufficient to entitle the appellant to a deficiency judgment. The appellant has

waived its assignment of error concerning a deficiency judgment. If this complainant has no claim for a deficiency judgment filed with the receiver, it has no basis upon which it is to receive anything out of the distribution in the receivership suit. It cannot show any ruling on this matter to its injury. This attempt is made to cry deficiency judgment, and pro rata distribution, so that it can have an excuse to set forth an argument for its friend and ally the American Water Works and Electric Company.

Fifth: The receiver and all parties claiming through or under him are bound by the decree.

> Atlantic Trust Co. vs. Dana, 62 C. C. A. 657, 128 Fed. 209.

and the receiver is not appealing from the decree. "If the creditors, mindful of their interests are dissatisfied with the manner in which he (the receiver) represents them in suits that are pending, they may, under proper circumstances, intervene and ask to be made parties, so as to speak for themselves."

> Atlantic Trust Co. vs. Dana, 62 C. C. A. 657, 128 Fed. 209 at p. 224.

Sixth: Why did it not raise this point in the trial court? It was present and it could have asked the receiver to represent it in this connection, if it had had a deficiency judgment. The receiver was very eager to do all he could for appellant and was its principal witness and very willing. (Tr. 151 to 158 inclusive).

As to point No. 6 set forth by appellant in its brief on page 20, these appellees say:

First: If appellant had brought the foreclosure suit prior to the appointment of the receiver and appellees had made the showing set out in their petition to intervene in this cause, there is no doubt but what appellees would have been entitled to intervene in such foreclosure suit and contest the validity of the mortgage. This is undeniably true, under the decision of the Union Trust etc. Bank vs. Idaho Smelting and Refining Co., supra. Our position is that our right to defeat the lien of this mortgage, which right we had prior to the appointment of the receiver, should not be defeated or cut off by the appointment of the receiver, and was not cut off by the appointment of the receiver.

By the appointment of the receiver, the receiver may have obtained the right to attack the mortgage for and on behalf of all the creditors. But this did not take away from the creditors their separate rights, which they had prior to appointment of the receiver, and which was not altered by the appointment of the receiver, to attack the chattel mortgage upon their own behalf. At least this is true when the receiver fails, refuses or neglects to act.

Atlantic Trust Co. vs. Dana, 128 Fed. 209, 62 C. C. A. 657.

Second: What right has this appellant to complain? It has no deficiency judgment and has lost nothing by reason of the fact that these four creditors instead of the receiver made the attack upon the mortgage.

Third: This point could only be raised by the receiver. The receiver is not appealing. The receiver is bound by the decree.

As to point No. 7 set forth by appellant on page 21 of its brief these appellees say:

That this point is immaterial for the reason that the receiver chose not to attack the mortgage.

It is immaterial to appellees that the receiver did not have the right to attack the mortgage.

The only party injured by this argument of appellant is the friend and ally of appellant to wit; the American Water Works and Electric Company, who is bound by the decree. This is the view adopted by the trial court. (Record 308, 309).

As to point No. 8, raised by appellant on page 21 of its brief:

This point is an admission on the part of appellant that if the creditors had a right to attack the chattel mortgage before the appointment of the receiver, that the appointment of the receiver did not take away the right of creditors to attack the chattel mortgage after the appointment of the receiver, and so far as this point is material in this discussion, it is in favor of the proposition, that since the creditors had the right to attack the chattel mortgage before the appointment of the receiver, they had the same right after the appointment of the receiver.

As to point No. 9 raised by appellant on p. 22 of its brief these appellees say:

First: That this appellant cannot raise this point for the first time on appeal.

Second: That it made no assignment of error on this point.

Third: That it never made such a contention in the trial ccourt.

Fourth: That it has no deficiency judgment. That under the proof introduced by it on the trial of the case, it was not entitled to a deficiency judgment and that it admitted to the court that it was not entitled to a deficiency judgment and that it stated to the court that it would be satisfied with a decree of foreclosure, and accepting appellants statement as his position in the matter, the court decreed the foreclosure but did not provide for a deficiency judgment.. The appellant waived its assignment of error based upon the court's failure to give a deficiency judgment for the reason that unless the appellant had waived its assignment of error, the court would have included in the record of the case on appeal the admission of appellant that it would be satisfied with a decree of foreclosure without a deficiency judgment under the proof as presented.

As to point No. 10 on page 22 of appellant's brief these appellees say:

First: This appellant did not raise this point in the trial court.

Second: This appellant should not be allowed to raise this point for the first time on appeal.

Third: This appellant has no deficiency judgment

therefore it has no claim upon which it could expect to pro rate in the receivership suit. Therefore it is attempting to complain of a ruling that can affect it in no way.

Fourth: The receiver would be the only party that could raise this point. The receiver is not appealing and is therefore bound by the decree.

ARGUMENT.

The appellant the Equitable Trust Company of New York, in its brief on page 24 states that it has a double grievance: (1) That under the ruling of the trial court appellees became, through the appointment of the receiver, vested with the right, which they did not have when the receiver was appointed to attack this mortgage and (2) that the trial court held the assets so removed from the lien of the mortgage by the appellees should be distributed to such creditors instead of being turned over to the receiver for administration in the receivership suit for the benefit of all creditors.

As to its first grievance, we would answer that the trial court simply held that the appointment of the receiver did not deprive appellees of any rights or any defenses to appellants mortgage, which appellees might have set up before the appointment of a receiver.

As to its second grievance, we would answer that this appellant cannot complain that the $45,000.00 obtained by these four claimants in the foreclosure suit, will not go into the funds in the receivership

suit, for the reasons that this appellant did not raise this point in the trial court; it should not be allowed to raise this point for the first time on appeal; it took a position in the trial court that the receiver should not be allowed to attack the mortgage because he stood in the shoes of the debtor; it has no defiiciency judgment; it is not entitled to one; it could not pro rate in the receivership if the $45,000 were placed in the receivership funds; it has waived its assignment of error on this point; it is only attempting to make this point to strengthen the demand of its ally, the other appellant ,the American Water Works and Electric Company.

These two creditors—the Equitable Trust Company of New York and the American Water Works and Electric Company—have some sort of a collusive interest by which both will be satisfied if either of them can prevent any of the assets of the Great Shoshone and Twin Falls Water Power Company from paying any other creditors' claims.

Paragraph XVIII of the proffered amended complaint in intervention of the American Water Works and Electric Company reads as follows:

"That heretofore and early in the year, 1915, this intervener and National Securities Corporation entered into negotiations with respect to certain property of this intervener including its said claim against the said Great Shoshone and Twin Falls Water Power Company; that in the course thereof a proposition was made by said National Securities

Corporation to acquire all said property including said claim; that it was thereupon agreed between said parties that said National Securities Corporation should purchase the same but the purchase price was not agreed upon; that from time to time thereafter said parties endeavored without effect to agree upon such purchase price until some time in January, 1916.. That such purchase price has not been paid; that said claim is still the property of this intervener, and that title thereto has not passed and was not intended to pass to said National Securities Corporation or at all by virtue of said agreement or in any other manner." (Record, p. 299).

The National Securities Corporation is the owner or holder of the bonds being foreclosed by this appellant. (Record p. 144).

Then the trustee proceeds on p. 24 of its brief to set forth its two contentions:

(1) "That the lien of its mortgage was superior to the claim of the appellees who were permitted to attack the same.

(2) That if it cannot hold the property under the lien of its mortgage, it should be administered in the receivership suit for the equal and pro rata benefit of all creditors.

As we have before pointed out, the first of these contentions is the only one which this appellant can make legitimately upon this appeal. However, we will direct our argument against both of these contentions.

POINT ONE.

AS TO THE PLACE OF RECORDING CHATTEL MORTGAGES THE LAWS OF THE STATE WHEREIN THE PERSONAL PROPERTY MORGAGED IS SITUATED CONTROLS.

In re Nuckols, 201 Fed. 437:

> "Where at the time of the execution of a chattel mortgage, the property was situated in a state other than that in which the mortgagor was domiciled and the mortgage executed, it is in bankruptcy proceedings, governed as to registration, and its validity and priority determined by the law of the state where the property was situated, rather than that of the state where the mortgage was executed, and in which the bankruptcy proceedings is being conducted."

(See many cases cited in opinion.)

6 Cyc. 1060.

> "It sometimes happens that the nature, validity, construction and effect of a mortgage has to be determined in a jurisdiction other than that where the contract was made. Where the place of contract and the locus of the property mortgaged coincide, the alws of that jurisdiction will govern the interpretation of the mortgage on the doctrine of comity. In cases where the property is situated in one jurisdiction and the mortgage is executed in another, the law of the place where the property is situated will usually govern.

See Jones Chattel Mtgs. Sec. 305.

Ames Iron Works v. Warren, 76 Ind. 512, 40 Am. Rep. 258:

> A mortgage of chattels is governed by the law of the place where the chattels are located at the time of the execution of the mortgage.

Pleasanton vs. Johnson, 47 Atl. 1025, 91 Md. 673:

> A mortgage of personal property within the state, executed in another state according to the law there, but not conforming to Art. 21, Sec. 49, requiring an affidavit by the mortgagee that there is a bona fide consideration, is not, on the ground of comity, superior to an attachment of the property of the mortgagor.

POINT TWO.

The deed of trust and supplemental mortgages sought to be foreclosed by appellant were void as to the species of personal property which did not form a constituent part of, and were not necessary for the maintenance, operation and repair of the public service corporation's plant.

Sec. 3408, I. R. C. Affidavit and Record of Mortgage:

> "A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith and for value, unless:
>
> First: It is accompanied by the affidavit of the mortgagor that it is made in good faith and without any design to hinder, delay or defraud creditors.
>
> Second: It is acknowledged or proven, as grants of real estate, and the mortgage, or a true

copy thereof is filed for record with the county recorder of the county where such property is located and kept."

Bayne vs. Brewer Pottery Co., 90 Fed. (Ohio) 754:

"RICKS, District Judge: On the 1st day of May, 1890, the Brewer Pottery Company duly executed to Samuel B. Smeath, trustee, a mortgage to secure 60 bonds, each for the sum of $500, payable on the 1st day of May, 1895, with interest at the rate of 6 per cent. per annum, payagle semi-annually on the first days of May and November of each year. By this mortgage the Brewer Pottery Company conveyed to Samuel B. Sneath, trustee, property described as follows:

Situated in the City of Tiffin, County of Seneca, and state of Ohio, and known as Blocks thirty-five and thirty-eight, in Second Highland Addition to the City of Tiffin, Seneca county, Ohio, containing eight acres of land: together with all and singular the brick pottery plant situated thereon, and including all its engines, machinery, tools, molds, and all other personal property belonging thereto, and used by said company in its business of manufacturing."

"This mortgage was, on the 7th day of May, 1890, duly recorded as a mortgage of real estate in the records of Mortgages, vol. 59, p. 165, of Seneca county, Ohio. The mortgage was never verified, as required by the statute of this state covering chattel mortgages, nor refiled at the expiration of any of the several years since its execution, as required by the Ohio statutes governing chattel mortgages. In April, 1897, upon appropriate bill of complaint filed by the complainants, who are creditors,

and bring the action n behalf of themselves and other creditors, Frederick A. Dugan was appointed an ancillary receiver of the Brewer Pottery Company, and thereupon he gave proper bond, and has ever since been discharging the duties of such receivership. Samuel B. Sneath filed his answer and cross bill in this action, setting up the mortgage above described, and upon appropriate proceedings the property was appraised and sold under the order of this court and the fund arising from such sale paid into court to await the further order of this court. Before the sale was made, however, a commissioner was appointed by this court, and directed to separately appraise the real property and the chattels of the Brewer Pottery Company, in order that the court might thereafter determine the proper mode of distribution of the proceeds of the sale. Such appraisement was reported in three schedules, etc. (See valuable discussion.)"

Conclusions of the court.

1. The mortgage in this case was a mortgage of real estate as to the property embraced in schedules 1 and 2, and a chattel mortgage as to the property embraced in schedule No. 3. As to the property in schedule No. 3, it came within the provisions of section 4150 of the revised statutes of Ohio, which are as follows: Sec. 4150 (Mortgage of Chattels void unless Filed.) Quotes section.

In Bishop v. McKillican, 57 Pac. 76, Cal. 1899, a corporation operating a street railway in Oakley, California, executed a mortgage to the California Title & Trust Co. The mortgage by its terms included all tracks, depot grounds, buildings, machinery, workshops, dummies, cars, rolling stock of all kinds, full equipment, tools, fixtures, and other property which is now, or may hereafter, in whole or in part be constructed, acquired, etc.

This mortgage was acknowledged and recorded as a real estate mortgage and contained no affidavit. This mortgage was not recorded as required by the Civil Code in reference to chattel mortgages. Afterwards, it is claimed by appellants, the railroad company acquired certain rolling stock, two bundles of wire cable, some old iron and some office furniture. A creditor attached the personal property just mentioned, and MacKillican, the sheriff, took possession of it. In an action brought by the California Title & Trust Co., the plaintiff herein was appointed receiver.

Opinion: "The property in question in this action is personal and not real estate. The mode and manner of mortgaging chattels or personal property is pointed out in Civ Code, Sections 2950 to 2972 * * * As already stated the mortgage in question did not purport to be executed in pursuance to the requirements of the Code concerning chattel mortgages, but only as a mortgage of real property."

The court discusses the decisions of the federal court in Southern California Motor-Road Co .v. Union Loan & Trust Co., 12 C. C. A. 215, 64 Fed. 450, and in Illinois Trust & Savings Bk. v. Seattle Electric Railway & Power Co., 27 C. C. A. 272, 82 Fed. 941.

"Still it would hardly be claimed that an individual, owning a railroad and all the other property that ordinary railroad corporations own, could mortgage the whole property, real, personal, and franchises, in one instrument as a real estate mortgage. See also Hoyle vs. Railroad Co., 54 N. Y. 314. The mode and manner of executing mortgage, both of real and personal property, will be found in altogether a different part of the code from that concerning corporations. It is declared in Section 2957 that a mortgage of personal property is void as against creditors of the mortgagor and subse-

quent purchasers and incumbrancers of the property in good faith and for value, unless executed and acknowledged and recorded as in the article prescribed. No exception is contained in favor of any person, whether a natural person or a corporation; and the language is too plain to be misunderstood, and requires no construction. It is intimated in the opinion of the circuit court of appeals referred to above, that if a state by statute has "settled the matter by direct legislation," the court will feel bound to follow it. We think that our state has settled the matter in the provisions of the Code referred to, and it is the duty of this court to follow the law as there laid down.

Manhattan Trust Co. of New York, v. Seattle Coal & Iron Company, (Wash.) 48 Pac. 333:

Bill by Manhattan Trust Co. against the Seattle Coal & Iron Co. for the appointment of a receiver for the defendant, a receiver was appointed and he took possession of the property. Murphey Grant & Co. and other creditors filed separate petitions asking that their several claims be declared prior to the lien of the trust deed of $1,000,000, executed to plaintiff as trustee on defendant's property.

Opinion: "There is a large quantity of personal property taken possession of by the receiver, and it appears a considerable portion thereof realized upon, and the funds have been used by the receiver in his management and control of the properties. There was no affidavit of the mortgagor that any mortgage of personal property was made in good faith, and without any design to hinder, delay and defraud creditors, and it was not recorded as a chattel mortgage. Sec. 1648, 1 Hill's Code, is as follows: 'The mortgage of personal property is void against creditors of the mortgagor or subsequent pur-

> chasers, and incumbrances of the property for value and in good faith, unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay or defraud creditors, and it is acknowledged and recorded in the same manner as is required by law in conbeyance of real property.' Section 1649 provides: 'A mortgage of personal property must be recorded in the office of the county recorder in which the mortgage property is situated, in a book kept exclusively for that purpose.'' The plain literal meaning of these sections is against the contention of plaintiff that it has any lien whatever upon the personal property in the possession of the receiver, as against these petitioners.''

In American Loan & Trust Co. vs. Olympia Light & Power Co., 72 Fed. 620, Wash. 1896, chattel mortgage held void in this case, as to creditors, for failure to record as chattel mortgage, although it was recorded as a real estate mortgage, but where the mortgage supplied the defects by having the mortgage properly recorded as a chattel mortgage before the creditors had obtained a judgment, it was held that thus supplying the defects made the mortgage valid. The validity only dated from the date of properly recording and supplying the affidavit. This supplying of defects was done by the mortgagee before the foreclosure was started by the mortgagee.

Blumauer et al. v. Clock et al. (Wash.) 64 Pac. 844:

> The mortgage was recorded in the auditor's office on the 18th of November, 1896, but the mortgage did not contain the affidavit of good

faith, and was recorded as a real estate mortgage.

Respondents Clock, et al., filed loggers' liens upon the mortgage property, but with knowledge of the mortgage. The mortgage was held to be ineffectual to create a lien as against creditors, as to the personal property.

Says Chancellor Kent (2 Kent's Commentaries, 523):

"The policy of the law will not permit the owner of personal property to create an interest in another, either by mortgage or absolute sale and still continue to be the visible owner. The law will not stop to inquire whether there was actual fraud or not, for it is against sound policy to suffer the vendor to remain in possession * * It necessarily creates a secret incumbrance as to personal property, when to the world the vendor or mortgagor appears to be the owner, and he gains credit as such, and is enabled to practice deceit upon mankind."

Ruggles v. Cannedy, 127 Cal. 290:

Head note: The record of a chattel mortgage upon personal property pursuant to section 2957 of the Civil Code is intended to take the place of the immediate delivery and continued change of possession of personal property required in other cases of transfer by Section 3440 of that code; and if the mortgage is not acknowledged or proved, certified and recorded, as required by Section 2957, it is void as to the creditors of the mortgagor.

Collerd vs. Tully, et al., 78 N. J. Eq. 557, 1911.

Opinion: "Section 4 of the chattel mortgage act (P. L. 1902, 487) makes the chattel mort-

gage absolutely void as against creditors unless the affidavit is annexed, and the statute makes it obligatory that it should set forth the consideration of the mortgage not partially but completely."

Head note: The affidavit required by statute to be annexed to a chattel mortgage must set forth the consideration completely, and if it fails so to do the chattel mortgage is absolutely void as against creditors."

In people vs. Burns, 161 Mich. 169, 125 N. W. 740: (See also valuable note attached to this case in 137 Am. St. Rep. p. 466) it was held that under the Michigan statute nothing short of a change of possession or a filing for record as prescribed by statute can save a chattel mortgage, as against creditors of the mortgagor. As to them his good faith, in the absence of compliance with the statutes, is immaterial.

Under a statute requiring that a chattel mortgage, in the absence of change of possession, must be filed, and that, before filing an affidavit must be annexed to it setting forth that the mortgage is not entitled to record, and if recorded is not notice, if the notary does not fill out or sign the blank jurat, although the mortgagor may have sworn to and signed the affidavit.

In re Johnston, et al., 220 Fer. 218. Proceedings in Bankruptcy: Trustee seeks to set asile a mortgage.

,Head note: "Under Civ. Code, Cal. 2957, where chattel mortgagees neither signed an affidavit that the mortgage was not made to hinder and defraud creditors, nor were sworn to that effect,

it did not render the instrument valid that they went before a notary public for the purpose and with the intent of performing every act required by law to make the instruments a valid mortgage, especially in view of Code Civ. Pro. Cal. 2003, defining an affidavit as a written declaration under oath."

Hodgson vs. Butts, 3 Cranch, 140, 2 L. Ed. 391.

A chattel mortgage is void as to creditors and subsequent purchasers, unless it is acknowledged or proved by three witnesses and recorded as required by the Virginia statute regulating conveyances.

In Reynolds vs. Fitzpatrick, 57 Pac. 452 (Mont) 1899.

Head Note:A statement signed by all the parties to a chattel mortgage, but the jurat of which does not bear the signature or the seal of the officer before whom it was sworn to, is not a sufficient compliance with Civ. Code, Section 3861, providing that chattel mortgages shall be void unless accompanied by an affidavit of all the parties thereto, or their agents or attorneys in fact, stating that the mortgage was made in good faith and without any design to hinder, delay or defraud creditors.

Dunham vs. Cramer, 63 N. J. Eq. 151, holds: That the statutory requirements as to chattel mortgages extend not only to every instrument which is by its terms a mortgage, but also to every conveyance which is intended to operate as such.

In Hardin v. Bodge, 61 N. Y. S., 753, it is held: that though failure to file a mortgage covering both real and personal property may invalidate it as a chattel

mortgage, it does not affect its validity as a lien on the real estate.

First Natl. Bk. of Butte v. Beley, Sheriff, 80 Pac. 256, (Mont.):

> A chattel mortgage of property left in the possession of the mortgagor is void as against attaching creditors where it is not accompanied by the affidavit of the mortgagee, required by Civ. Code Section 3861, that the same is made in good faith, without design to hinder, delay or defraud creditors.
>
> Refiling of a mortgage originally void as to creditors does not validate it as it lacked the affidavit of good faith.
>
> Opoinion: "The statute is plain and needs no interpretation."

Machette vs. Wanless, 1 Colo. 225.

> A chattel mortgage which is not acknowledged according to Rev. St. Ch. 14 Sec. 102 cannot be received in evidence.

Beeler v. C. C. Mercantile Co., 8 Idaho 644, at 650:

> Sullivan J.: "Therefore a valid chattel mortgage cannot be given upon property other than that there prescribed; and there is good reason for this rule, as the registry law requires (Acts 1899, p. 121) chattel mortgages to be filed with the county recorder, and kept there, and certain facts contained in the mortgage must be entered in a record kept for that purpose; while a real estate mortgage must be filed by the recorder and recorded at length in different books, and a real estate mortgage registered as a chattel mortgage, vice versa, would not be a legal registry or recording. The provisions of said section are a prohibition against mortgaging real estate by a chattel mortgage.

After defining real estate and personal property, our statute prescribes the method and manner of incumbering and transferring each class, and it is not in the power of the parties to waive or alter, by their agreement, any of these regulations. In Hoyle vs. R. R. Co., 54 N. Y. 315, the court in referring to rules established by statute for the transfer of property, said: "These regulations have been adopted with regard not only to the interests of the parties immediately concerned but also with regard to the interests of others in ascertaining the ownership of property."

Jones on Corporate bonds and mortgages, Sec. 138:

"Statutes in regard to acknowledging and recording chattel mortgages do not ordinarily embrace mortgages by railroads of personal property used and appropriated for railroad purposes, when such mortgages cover such personal property in connection with the corporate real estate and franchises." Cites:

Hammock v. Loan & Trust Co., 105 U. S. 77;
Cooper v. Corbin, 105 Ill. 224;
Peoria & Springfield R. Co. v. Thompson, 103 Ill. 187;
Farmers' ,etc. Co. v. Detroit R. Co., 71 Fed. 29.

There is a special rule as to the legal nature of rolling stock.

Sec. 150 (Jones on Corporate Bonds and Mortgages):

In conclusion upon this part of the subject, it may be said that, while there are many and strong arguments for holding that rolling stock is part of the realty—and this view seems to have the support of the United States Courts—the weight of authority in the state courts seems to be against that position."

In Hamilton v. David C. Beggs Co., 179 Fed. 949, it is said:

> "In Etheridge v. Sperry, 139 U. S. 276, 277, 35 L. Ed. 171) Mr. Justice Brewer defined the attitude of Federal Courts as to chattel mortgage laws as follows:
>
> "The matter is not one of general commercial law. While chattel mortgages are instruments of general use, each state has a right to determine for itself, under what circumstances they may be executed, the extent of the rights conferred thereby, and the conditions of their validity. They are instruments for the transfer of property, and the rules concerning the transfer of property, are, primarily, at least, a matter of state regulation. We are aware that there is a great diversity of state regulation. We are aware that there in the rulings on this question by the courts in the several states; but, whatever may be our individual views as to what the law ought to be in respect thereto, there is so much of a local nature entering into chattel mortgages that this court will accept the settled law of each state as decisive in respect to any case arising therein." Chicago Union Bank v. Kansas City Bank, 136 U. S. 223, 34 L. Ed. 341."

This mortgage was filed where only one of the two mortgagors resided.

First National Bank of Egerton vs. Biederman,

Am. & Eng. Ann .Cases, 1913, C. 837, 134 N. W. 1132, 149 Wis. 8:

> Head Note under Statute, Wisconsin, 1888, Sec. 2313, which provides that a chattel mortgage shall be valid only against the parties unless possession be delivered and retained or the mortgage be duly filed (in this case there were two mortgages and mortgage was recorded only

where one resided instead of in both places as required by statute), a subsequent mortgagee with notice of a prior unrecorded mortgage takes free from the rights of the holder of such mortgage. * * * Where words of a statute are definite and its meaning certain, there is no room for construction.

Opinion: "There is no room for interpretation or construction here. The words are definite and the meaning certain—'any other person than the parties', can mean but one thing and the court is not at liberty to construe it to mean anything else. * * * The idea of the statute doubtless is that it is better to have the statute certain and effective than it is to leave the question in each case to depend on notice or good faith, and thus afford opportunity for conflicts in oral testimony and offer a reward to active and fertile memories."

POINT THREE.

ACTUAL NOTICE OF UNRECORDED CHATTEL MORTGAGE DOES NOT BIND CREDITORS. BUT CREDITORS HAD NO ACTUAL NOTICE IN THE CASE AT BAR.

Gardenas v. Miller (California) 108 Cal. 250, 41 Pac. 472, 49 Am. St. Rep. 84:

A chattel mortgage is void against a creditor of the mortgagor, though he has notice thereof, under a statute declaring that a mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith and for value, unless it is acknowledged, or proved, certified, and recorded in like manner as grants of real property. The words "in good faith and

foor value'' refer to purchasers and encumbrancers, and not to creditors.

Section 318, Jones on Chattel Mortgages.
New York: Farmers' Loan & Trust Co. v. Hendrickson, 25 Barb. 484; Stevens v. Buffalo & N. Y. Ry. 21 Barb. 590.
Ohio: Houk v. Condon, 40 Ohio St. 569.
Texas: Brothers v. Mondell, 60 Tex. 240.
Nebraska: Spaulding v. Johnson, 67 N. W. 874.
Farmers & Merchants Bk. v. Anthony, 57 N. W. 1029.
Nevada: Simpson v. Harris, 31 Pac. 1009.
Michigan: Sachs v. Norn, 102 N. W. 357, Vining v. Millar, 74 N. W. 459.

In American Loan & Trust Company v. Olympia Light & Power Company, 72 Fed. 620, it was held: That under the statute of Washington relating to the lien of chattel mortgages, such a mortgage unless accompanied by the affidavit required by statute, and properly recorded, is void as to creditors, though they have actual notice of its existence.

In People v. Burns, 161 Mich. 169, 125 N. W. 740, 137 Am. St. Rep. 466, (with note attached) it was held: That an instrument which conforms to the recording laws is, when recorded, notice to every one, but an instrument which does not comply with the statutes on which it is based is notice to no one, even if recorded.

Ryan Drug Store Company v. Hvambsahl (1894) 61 N. W. 299:

> Where revised Statutes 2313, declaring that no mortgage of personal property shall be valid,

as against third persons, unless the property be delivered to and retained by the mortgagee, or unless the mortgage, or a copy thereof be filed, is not complied with, the law conclusively presumes the mortgage to be fraudulent as to creditors, and no evidence of good faith, however clear, will render it valid.

The ground of an attachment being that defendant had a chattel mortbage on his store, which had not been filed, it is not material whether plaintiff knew before the debt was contracted of the existence of the mortgage.

Smith vs. Allen, 138 Pac. 683, Wash. 1914:

Rem. & Bal. Code Sec. 3660 providing that an unacknowledged chattel mortgage is void as against bona fide creditors, renders such void as to creditors, whether they become such before or after the recording of such mortgage and whether or not they have notice thereof.

In Hinchman bs. Point Defiance Ry. Co., 44 Pac. (Wash.) 867, the court construes the section requiring the recording of chattel mortgages and holds it immaterial whether the creditors had notice of an unrecorded chattel mortgage or not. The mortgage was recorded as a real estate but not as a chattel mortgage. In construing the mortgage as not effectual without being recorded as a chattel mortgage to create a lien on personal property as to creditors, the court said that such interpretation of the statute was in accord with the construction placed upon a similar statute by the courts of New York, Michigan, Ohio, New Jersey, Nebraska, Minnesota, Kansas and the Dakotas.

Alferitz v. Scott, 62 Pac. 735, (Cal.) 1900:

> Where a chattel mortgage was recorded without the affidavit required by section 2957 from the mortgages, the omission was not remedied by a subsequent affidavit without again recording the instrument, and the mortgagors creditors could proceed by attachment against the property in the hands of the mortgagor.

First National Bank of Rock Springs vs. Ludvigsen, 56 Pac. 994, (Wyo.) 1899, Laws 1890-91 Ch. 7, Sec. 5 provide that every mortgage of personal property not accompanied with change of possession, etc., "shall be absolutely void as against creditors of the mortgagor, and as against subsequent mortgagees or purchasers in good faith," unless filed as therein required. Also provided "that chattel mortgages shall cease to be valid as against the creditors of the person making the same and as against subsequent purchasers or mortgagees in good faith" 60 days after its expiration, unless before such time an affidavit of the mortgagee of the amount still unpaid be made and filed, etc."

> Opinion: "We are of the opinion that a chattel mortgage not renewed as required by law ceases to be valid as against creditors of the mortgagor who became such before as well as after the default in renewal."

In Pierson vs. Hickey, Sheriff, 91 N. W. (S. D.) 339:

> "By the use of the word "subsequent" it is clear that the legislature intended to qualify only the words "purchasers and incumbrancers" and as no restriction is placed upon the word "creditors," all persons of that class are in-

cluded, whether antecedent or subsequent to the execution of the mortgage."

(MANY CASES CITED).

"The injury that an unfiled chattel mortgage may occasion an antecedent creditor is likely to arise from the apparent unincumbered ownership of the property in the possession of his debtor, justifying the inference of perfect security, and inducing delay in the enforcement of his claim."

POINT FOUR.

ONUS OF SEEING THAT CHATTEL MORTGAGE IS PROPERTY RECORDED IS UPON THE MORTGAGEE.

In People vs. Burns, 161 Mich. 169, 125 N. W. 740, (also see valuable note 137 Am. St. Rep. p. 493) the court said:

"One who seeks to benefit from the recording laws must incur all of the risks of the failure to put his papers duly upon record, whether the fault shall be his own or that of an officer; Barnard vs. Cappau, 29 Mich, 162; Grand Rapids Nat. Bank v. Ford, 143 Mich. 402, 114 Am. St. Rep. 668, 107 N. W. 76, 8 Ann. Cas. 102."

POINT FIVE.

CONTEST OF FORECLOSURE.

A CREDITOR SHOWING A LIQUIDATED OR PROVEN CLAIM AND THAT AN EXECUTION HAS BEEN ISSUED AND RETURNED NULLA BONA OR THAT IT WAS IMPOSSIBLE TO HAVE AN EXECUTION ISSUED AND RETURNED NULLA BONA, BUT THAT IF

ONE HAD BEEN ISSUED, IT WOULD HAVE BEEN RETURNED NULLA BONA FOR THE REASON THAT THE DEBTOR WAS INSOLVENT AND HAD NO OTHER PROPERTY THAN THAT CONSTITUTING THE SUBJECT MATTER OF THE FORECLOSURE SUIT, MAY CONTEST SUCH FORECLOSURE BECAUSE SUCH CREDITOR IS FOR SUCH PURPOSE IN THE SAME POSITION AS A LIEN CREDITOR.

Idaho Revised Codes, Section 3418, "The right of the mortgagee to foreclose, as well as the amount claimed to be due, may be contested in the District Court by any person interested in so doing, for which purpose an injunction may issue if necessary."

Rule 37. Rules of practice for the Courts of Equity of the United States, promulgated by the Supreme Court of the United States, Nov. 4, 1912.

> "PARTIES GENERALLY--INTERVETION. Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought. All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determina-

tion of the cause. Persons having a united interest must be joined on the same side as plaintiff or defendants, but when any one refuses to join, he may for such reason be made a defendant.

Any one claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the property of the main proceeding."

Section 4111. Idaho Revised Codes, 1907.

"Any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both."

IS A GENERAL CREDITOR A PROPER PARTY DEFENDANT?

A general creditor under ordinary circumstances, may not be, but the creditors intervening and answering in the case at bar are not general creditors. They are the equivalent of judgment creditors. Their claims have been presented, allowed and approved as valid claims against the debtor and had it not been for the intervening receivership proceedings, the creditors would have been judgment creditors. Moreover, the circumstances of this case are extraordinary and very unusual.

By the intertention of the receivership proceedings the creditors have been prevented from attaching taking their judgments and attacking the chattel mortgage as they otheryise yould have done and would have had a right to do.

So where there are allowed claims, which by operation of law are all that the creditors could have under the circumstances, which are the equivalents of judgments, when the mortgagee pleads that the lien of his chattel mortgage is prior and superior to all other liens, and where the law requires the mortgagee to make all lien claimants of record parties defendant and where the creditors would have been lien claimants of record had it not been for the receivership, then these creditors with allowed claims are practically forced into this case as defendants.

It is important too to notice that the receiver had taken no steps to protect the creditors. When this court allowed the creditors to intervene as defendants, the receiver had not answered. The creditors had the right to assume that if they were to have any protection, that they must attend to the matter themselves.

In 34 Cpc. 340, it is stated that where a court of equity calls upon creditors to come in and prove their claims, it is a substitute for separate suits at law on each of the claims.

> Ruggles v. Cannedy, 127 Cal. 290: Head Note: Where creditors o an insolvent mortgagor of personal property are prevented from suing by reason of the adjudication of his insolvency, and are limited to the proof of their claims against him, such proof is equivalent to a **judgment**, and shows a sufficient interest of the creditors in the mortgaged property to warrant the assailing of the chattel mortgage as a void act for want of a prompt record, and the assignee in insolvency represents the interests of the creditors, and

may recover the property for their benefit.

Opinion: "In this case, the creditors had not obtained judgments against the mortgagor, nor indeed had they instituted any proceedings against him at the time he was adjudged an insolvent. After that judgment by force of the insolvency act itself, they were prevented from resorting to any proceeding in law or equity, for such purpose. They were limited to the presentation of claims in the insolvency court. This they did, and when those claims were allowed and approved the questions involved in them became **res judicata.** The presentation, allowance and approval of the claim, while not in strictness a judgment, had much of the force and effect of a judgment, and was the only thing in the nature of a judgment which creditors so situated could obtain. For the purpose of enforcing their rights against fraudulent or void acts of the insolvent, it is the equivalent of a judgment. (Roan v. Winn 93 Mo. 503).

Says Mr. Justice Cooley in Putnam v. Reynolds, 44 Mich. 144.

Even creditors, it is said, cannot attack the mortgage, except indirectly through a seizure of the property by attachment, or other suitable proceeds. This is doubtless true where the invalidity of the mortgage arises from the fraud of the mortgagor; but whether the same rule will apply when the mortgage was originally valid, but is made void by the neglect of the mortgagee may well be questioned. It would be easy to consider weighty considerations arising in such cases, but not existing in the case of a fraudulent mortgage, and which it might be well thought should control.

In re Standard Telephone & Electric Co., 157 Fed. 106:

While, under the law of Wisconsin, a general creditor cannot attack the validity of a chattel mortgage by an independent action in equity, but must first exhaust his legal remedies, yet under the decision of the Supreme Court of the State, where such creditors are prevented from prosecuting by a general assignment or bankruptcy proceedings, the assignee or trustee in bankruptcy may attack such mortgage in their behalf; and especially may this be done where the property has passed into the hands of the court and the mortgagee comes into such court for the purpose of enforcing his lien.

Section 2650, Thompson on Corporations:

"Judgment creditors may intervene and attack the validity of bonds."

Cites Continental Trust Co. v. Toledo, etc. R. Co., 86 Fed. 929.

"Judgment creditors have generally the right to attack the validity of the corporate bonds or mortgage, and to intervene and be permitted to defend."

Phoenix Natl. Bk. v. Cleveland Co., 58 Hun. (N. Y. 606, 11 N. Y. S. 873.)

In the case at bar the creditors are not mere contract creditors as they have been forced out of that position of advantage which they otnerwise would have had except for the placing of the property in the hands of the court. They would have been attaching creditors but their remedy at law was taken away from them.

Note: From A. & E. Ann. Cas. 1912 B. Vol. 23 p. 1108:

"According to many decisions it is not necessary that the creditor shall have a specific lien

on the property before he may assail the validity of an unrecorded mortgage."

"He must have some right to or interest in or lien on the property itself. Before he may contest its validity, his debt must be fastened on the debtor's property covered by the mortgage by law, judicial process, or in some other way. * * The statute does not declare such a lien (attachment or execution) essential. A levy is sufficient merely because it creates such a right to the property as that the plaintiff may resort to the courts for its protection. The lien created by the levy of a writ of attachment or execution, as distinguished from some other right to or interest in the property mortgaged, has never been held by this court to be essential before assailing an instrument as invalid because unrecorded. A right to the property obtained in any other way is quite as effective." Blackman vs. Baxter, 125 Ia. 118, 2 Ann. Cas. 707, 100 N. W. 75, 70 L. R. A. 250.

"A creditor whose debt was subsisting at the time of the giving of a chattel mortgage may by subsequently obtaining judgment and levying upon the property, place himself in a position to attack the chattel mortgage or to resist its enforcement. But this is not the only way in which the right of a creditor to attark the validity of the chattel mortgage or to resist its enforcement may be asserted."

"Brockhurst vs. Cox, 71 N. J. Eq. 703, 64 Atl. 182. affirmed 72 N. J. Eq. 950, 73 Atl. 1117. It is sufficient if he has secured "a lien thereon by levp under a judgment and execution. or by some other method acquired a legal or equitable interest in the property." Sullivan v. Miller, 106 N. Y. 635, 13 N. E. 772. "A creditor could not attack the fraudulent transfer until he had obtained some process which authorized the seizure of the debtor's property. That is the true interpretation of the dicta relating to unfiled chattel mort-

gages. The rule that a creditor must first recover a judgment is simply one of procedure and does not affect the right. Therefore, where the recovery of a judgment becomes impracticable, it is not an indispensable requisite of enforcing the rights of creditors." Skilton v. Coddington, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885, "The recovery of a judgment is not necessary if the property has been in some form legally appropriated to the discharge of the mortgagor's debts." Farmer's L. & T. Co. v. Baker, 20 Misc. 387, 46 N. Y. S. 266. "It may be observed that in view of the fact that in certain contingencies, as for instance insolvency, the debtor's property is sequestered for the benefit of creditors as fully and effectually as it could be by attachment and levy, officers appointed by the court are generally held to be entitled to attack the validity of such a mortgage, even though there may be no lien creditors. Moreover on the same theory unrecorded mortgages have in some cases been allowed to be attacked by creditors whose claims were alloyed in insolvency proceedings. Ruggles v. Cannedy, 127 Cal. 290, 53 Pac. 911, 59 Pac. 827, 46 L. R. A. 371; Jewett v. Priest, 34 Mo. App. 509; or by creditors of an insolvent estate, the statute providing that the assets of such an estate shall be distributed among the decedent's creditors, Currie v. Knight, 34 N. J. Eq. 48g, Furthermore, it seems that if the administrator of an insolvent estate should **refuse** to act (or neglect?) any creditor could institute proceedings to require the proceeds of the mortgaged property to be devoted to the administration of the estate. "Rock Springs First National Bank v. Ludvigsen, 8 Wyo. 230, 56 Pac. 994, 57 Pac. 934, 80 Am. St. Rep. 928.

Appellant persists in making the erroneous statement that the trial court gave the appellees a prefer-

ence over other creditors "by virtue of the appointment of the receiver." This erroneous statement is made by appellant on pages 18, 20, 21, 23, 24, 27, 33, 34, 37, 43, 45, 49, 59, 87, 97, 98, and 102 of its brief.

This is entirely misleading and erroneous. It should be remembered that the case at bar is a foreclosure suit. No receiver yas appointed in the case at bar. The receiver was appointed in an altogether different suit, started six months prior to the commencement of the foreclosure suit brought by the Equitable Trust Company of New York. It seems that this appellant is bent upon creating an erroneous impression in the mind of this appellate court and is bent upon confusing the facts to such an extent that this court will get the impression that a receiver was appointed in the case at bar. The receivership suit was commenced six months before this case at bar, this foreclosure suit. Many creditors filed their claims in the receivership suit. The creditors merely allowed their claims to lie on file in the receivership suit. This condition existed for several months in the receivership suit. For several months the creditors in the receivership suit did not even take the trouble to prove their claims in the receivership suit, as they supposed that the lien of the deed of trust of the Ejuitable Trust Company would take all of the assets of the insolvent debtor, and it was supposed that the creditors in the receivership suit, except the secured creditor, the Equitable Trust Company of New York, would get only two or three per cent on their claims and pos-

sibly nothing whatever. Then, six months after the receivership suit had been commenced, and the receiver appointed therein, the Equitable Trust Company of New York brought this action to foreclose its deed of trust, and supplemental mortgages, purporting to be a first lien upon all the property of the insolvent debtor, real, personal and mixed, acquired and to be thereafter acquired.

At the time this foreclosure case was brought, and practically down to the date of this trial of this foreclosure case, it was supposed by all the creditors that the Equitable Trust Company of New York could take all of the property of the insolvent debtor to satisfy its deed of trust. So general was this supposition among the creditors in the receivership suit that the creditors in the receivership suit had not even taken the trouble to prove their claims in the receivership suit.

Then, just a few days before the trial in the foreclosure suit, L. M. Plumer and E. B. Scull as executors of the estate of L. L. McClelland, deceased, from an examination of the bill of complaint, discovered to their agreeable surprise, what no other creditor had found, that there was a defect in the deed of trust and one of the supplemental mortgages, then being foreclosed in this foreclosure suit, to wit, that the deed of trust and supplemental mortgage though covering personal property which was not a constituent part of a public service corporation's plant and not necessary for the maintenance, operation and repair of the said plant, had not been ex-

ecuted with the formalities required by the statutes of the State of Idaho, in which said personal property was situated, in that it did not have the affidavit at the end thereof to the effect that such deed of trust and supplemental mortgage had been given in good faith and without intent to hinder, delay and defraud creditors, and furthermore said instruments had not been filed for record as such instruments covering chattels in the State of Idaho are required by the statutes of Idaho to be filed.

Thereupon, this claimant immediately called this discovery to the attention of the other three claimants, the Towle claim, the Hahn claim, and the Shank claim, and upon examination of the pleadings in the foreclosure case found that the receiver had not set up such defenses on behalf of the creditors and found that the receiver was in default and had put in no answer whatever. Immediately the McClelland claim was proved in the receivership case, and the three other claimants proved their claims in the receivership case, having first notified the receiver. These claims were taken up in court, the receiver and his counsel being present, at the time and place pursuant to due and proper notice and three of the claims were duly allowed and approved by the court upon the showing then and there made, in the receivership case. Prior to the commencement of the receivership case, the Hahn claim had been reduced to judgment. Immediately after proving their claims, the McClelland claim and the Shank claim petitioned for leave to intervene in the foreclosure suit for the

purpose of assailing the lien of the deed of trust and supplemental mortgage, and set forth in their petition for leave to intervene that the claimant was the owner and holder of a claim against the insolvent debtor in the sum of $15,625; that the insolvent debtor was insolvent, and that in a receivership suit started six months before that a receiver had been appointed for the insolvent debtor and its property; that the claimant had proved its claim in the receivership case and that the court had duly allowed the same; that said claim was due, owing and unpaid, that claimants had exhausted their legal rtmedies; **that ever since the appointment of the receiver, it had been impossible for petitioners to sue and attack, as the said property, and all thereof of the insolvent debtor,** the Great Shoshone and Twin Falls Water Power Company has been in the hands of said reieiver, and all legal remedies, if any there be are fruitless and petitioners have been and are wnolly unable to collect their said claim by pursuing their legal remedies; that the Equitable Trust Company had filed its foreclosure suit (the case at bar) seeking to foreclose its deed of trust against all of the property of the Great Shoshone and Twin Falls Water Power Company and seeking to have all of said property sold to pay a claim of $2,230,000.00, which complainant claimed due it; that unless the claimants are allowed to intervene in this foreclosure suit (this case at bar) and set up their defenses to the Bill of Complaint that the claim of this claimant will be rendered valueless."

See petition for leave to intervene (Record pp. 107 to 110).

The court thereupon allowed the claimant to intervene in the foreclosure suit, (the case at bar). The procedure upon the Shank claim was practically the same. These interveners did not delay the trial but filed their answers immediately. As to the Hahn claim and the Towle claim, no petition for leave to intervene in the foreclosure suit was necessary because the Equitable Trust Company of New York had made them parties when it filed its bill in the foreclosure suit (the case at bar).

The parties immediately proceeded to trial in the foreclosure suit. The trial took place in the latter part of October. The court thereafter rendered its decision (Record, p. 177) in the foreclosure suit, giving to the four claimants a prior claim over and above the lien of the deed of trust upon the personal property above described, and ordered that it be sold separately. The attorneys for the respective parties, however, stipulated that the property be sold as an entirety (Record, p. 187). These four claimants were the only creditors that had been diligent enough to prove their claims in the receivership suit, were the only creditors that attempted to assert their rights in the foreclosure suit, and at this time the receivership suit had been started over a year, and the foreclosure suit had been started over six months, and although the claim of the American Water Works and Electric Company was for a sum of over a million ($1,000,000.00), it did

not prove its claim in the receivership suit until February 14, 1916, over three months after the trial in the foreclosure suit, and although its president, H. Hobart Porter, was also president of the Great Shoshone and Twin Falls Water Power Company; was a member of the bondholders' protective committee that negotiated a transfer of the bonds of the Great Shoshone and Twin Falls Water Power Company to the National Securities Corporation, and gave notice to the Equitable Trust Company to commence foreclosure proceedings on the deed of trust in the foreclosure suit at bar, and although this same H. Hobart Porter, president of the American Water Works and Electric Company, sent a telegram in response to one from the attorney for the Equitable Trust Company of New York to his attorney in Boise, Idaho, in the midst of the trial of the case at bar, directing his attorney to aid the foreclosure proceedings by filing an answer for and on behalf of the Great Shoshone and Twin Falls Water Power Company, it gave as its principal reason, three months after the trial in the foreclosure suit, that the court ought to allow it to intervene, that it did not know that the foreclosure suit was going on.

So, then, it appears undeniably from the record in this foreclosure case that these four claimants did not gain a preference or seek to gain a preference "by virtue of the appointment of the receiver" in the receivership case, as the Equitable

Trust Company has set forth and reiterated on so many pages of its brief.

These four claimants simply proved their claims in the receivership suit. They sought no preference whatever in the receivership suit and the court gave them no preference whatever in the receivership suit.

Then, after proving their claims in the receivership suit, seeing that they could, by diligence, assail the lien of the mortgage in the foreclosure suit and take something away from the lien of the mortgage, while taking nothing from the creditors in the receivership suit, intervened in the foreclosure suit, not "by virtue of the "appointment of the receiver" in the receivership suit, as this appellant would have you believe, but because under the circumstances as set forth in the claimants' petition for leave to intervene, such as insolvency of the debtor; exhaustion of legal remedies, etc., these claimants were in such a position that a court of equity would say that they had such equities in their favor that they could intervene in the foreclosure suit as a matter of right.

If the right of these two claimants to intervene in the foreclosure suit is to be controlled by the laws of the State of Idaho, then the Idaho case of Union Trust etc. Bank vs. Idaho Smelting & Refining Co., supra, is decisive of this point in our favor. We satisfied every requirement declared to be necessary in that case.

If the right of these two claimants to **intervene** in this foreclosure suit and attack the mortgage in a Federal Court is to be governed, not by a State statute or decision, but by the rule of the Federal courts, then the case of Hollins vs. Brierfield Coal & Iron Company, 150 U. S. 371, 37 L. Ed. 1113, is equally decisive of this point in our favor.

In this latter case, certain mere contract creditors, whose claims had not been reduced to judgment, and who had no lien upon their debtor's property, sought to maintain a creditor's bill, in an independent action, to set aside as void a trust deed which was then being foreclosed in another suit in the same court. Justice Brewer remarked that they did not ask to **intervene** in the mortgage foreclosure suit. Justice Brewer in writing the opinion of the court held:

> "That such creditors whose claims had not been reduced to judgment could not maintain an independent creditor's suit under such circumstances, but that their proper course was to intervene in the mortgage foreclosure suit and there set up their claims just as appellees did in the case at bar."

In the opinion Justice Brewer says:

> "Doubtless in such foreclosure suits, the simple contract creditor **can intervene,** and if he has any equities in respect to the property, whether prior or subsequent to those of the plaintiff, can secure their determination and protection." * * * *
>
> "Their rights, like those of the trustee and the bondholders were derived from the corpor-

> ation defendant. Each claimed under it, and the validity and amount of such claims were matters properly and ordinarily considered and determined in a foreclosure suit. It is true the corporation might admit the validity of any or all of the claims, and then the validity could only be a subject of inquiry as between the claimants for the purpose of determining the matter of **priority**, but to that extent, at least, both validity and amount are always open to contest and determination."

Justice Brewer further remarked: "The line of demarcation between equitable and legal remedies in the Federal Courts cannot be obliterated by state legislation."

Equity Rule No. 37. Promulgated by the Supreme Court of the United States Nov. 4, 1912.

> INTERVENTION—" * * * Any person may at any time be made a party, if his presence is necessary or proper to a complete determination of the cause. * * * Any one claiming an interest in the litigation, may at any time be permitted to assert his right by intervention." * * *

See also In re Hickison, 162 Fed. 345.

Appellant's second contention is that if it is not entitled to hold all of the property of the insolvent debtor under the lien of its mortgage, then the property not so held should be turned over to the receiver for distribution in the receivership suit.

This contention could properly be made only by the receiver or by a creditor entitled to share in the distribution of assets in the receivership suit.

The appellant does not belong to this class of creditor and the receiver is not appealing.

And it should be remembered that in this foreclosure suit at bar no creditor asked the trial court to turn over any assets, taken away from the lien of the mortgage, to the receiver.

In his belated answer in the foreclosure suit setting up no issues, the Receiver did not ask the trial court to turn over to him such assets as might be taken from the lien of appellant's mortgage.

No one made such a request of the trial court and no one has ever made such a request until the appellant set such point forth in its brief, and furthermore no pleading filed by any one in the trial court in the foreclosure suit ever made any such request.

Could it be expected of the trial court, to take it upon itself to make a decree, without request from any one that certain assets obtained by four creditors in a foreclosure suit, were to be turned over to other creditors in an entirely different, distinct and separate receivership suit, which had never been consolidated with the foreclosure suit, and that the trial court of its own motion and not having been requested by any creditor would take what four creditors had earned in one foreclosure suit and remove the same to another receivership suit and divide such assets up generally with creditors who had never made a request for such generosity on their own behalf or by their representative?

Moreover, if this appellant had raised this point in the trial court, which it did not do, it could only raise it on the basis that it was entitled to a deficiency judgment, and, therefore, entitled to pro rate its deficiency judgment with the other claims in the receivership suit. If this point had been raised in the trial court in the foreclosure case, we would have been ready to show and would have shown that it has already been over paid on its claim. Rather than risk the opinion of this appellate court on that point, appellant chose to abandon its fifteenth and last assignment of error (Record pp. 176 and 254.)

This assignment of error would have brought up for determination in this court the amount of the money judgment this appellant was entitled to, if any. In view of the record that would have been a proper part of the transcript if this assignment had been insisted upon the appellant preferred to leave this out. We would refrain from mentioning this matter if this appellant had not insinuated so many times that it had a deficiency judgment, when as a matter of fact, it has no deficiency judgment, and was not entitled to one.

This accounts for the paragraph in the Record at page 176, reading as follows:—

> "Before settling the statement, counsel for appellant expressly waived its last assignment of error, (No 15), and therefore the statement is not made complete relative to the point therein involved."
>
> (Signed) DIETRICH, Judge.

The assignment "expressly waived" by the appellant is as follows:—

> "15. Because the Court erred in not entering judgment in favor of complainant for the full amount of the bonds issued and outstanding, to-wit, $2,230,000.00, with interest thereon from the 1st day of May, 1914, at the rate of five per cent per annum."

REPLY TO THE BRIEF OF THE APPELLANT, AMERICAN WATER WORKS & ELECTRIC COMPANY.

The appellant, the American Water Works & Electric Company, makes three specifications of error.

First: That the Court erred in denying the first petition of this appellant to intervene and requiring it to make a further showing by amended petition.

Second: That the Court erred in denying its amended petition to intervene.

Third: That the Court erred in ordering the four creditors, who had resisted the foreclosure of the mortgage, to be paid out of the fund which by the decree of foreclosure was set aside for that specific purpose.

(See brief of Appellant, A. W. W. & E. Co., pp. 12 and 13.)

As to the first specification of error, appelles think that appellant will concede that the same was waived when it accepted the Court's ruling, took further time, as given by the Court, and attempted to comply with the Court's ruling.

In support of its position, appellants set forth two points:—

First: That after a receiver is appointed in a receivership suit, no creditor can by any subsequent proceedings acquire a preference in the trust funds so sequestered; and

Second: Where one claims an interest in a fund in the hands of the Court which can be protected only by intervention, that then he has an absolute right to intervene and to review by appeal an order refusing such right.

The first point as stated by appellant is misleading and confusing because it would lead this appellate court to believe that by some proceeding in the receivership suit, these appellees had obtained a preference in the receivership suit in the receivership funds.

This is absolutely erroneous. These appellees did nothing in the receivership suit except file their claims and prove them.

Then when the Equitable Trust Company commenced to foreclose a mortgage in an entirely different suit some six months later (the case at bar), these appellees intervened in that foreclosure suit (this case at bar), and assailed the mortgage void as to such attacking creditors.

We have not obtained a preference over any other creditor in the receivership suit and have not injured this appellant in the least and have not deprived it of any right and have not taken from it one cent

which it otherwise would have had in the receivership suit. The mortgage which we attacked was valid as between the mortgagor and the mortgagee and had the interveners not attacked the mortgage in the foreclosure suit the mortgage would have taken all of the property and none of the $45,000 which the interveners, appellees, saved for themselves in the foreclosure suit, would have reached the receivership suit to be distributed by the receiver.

The receiver would have been the only party that could complain on this point in the foreclosure suit, if the receiver had made such a point in the foreclosure suit, as the receiver was a party and could have raised the point, but this appellant is simply a would-be intervener, it has never been a party to the foreclosure suit. It cannot raise a point based upon a ruling against the receiver in the foreclosure suit until it has been permitted to intervene in the foreclosure suit.

This appellant, like the Equitable Trust Company of New York, is also attempting to convey to this appellate court the impression that these four claimants have attempted by subsequent proceedings in the receivership suit, to obtain a preference in the trust funds in the hands of the receiver in the receivership suit.

This is far from the facts in these cases.

The appellees intervened in the foreclosure case on their own behalf, assailed the mortgage and were rewarded for their diligence in asserting their equitable rights in this foreclosure case by the de-

cree of the Court to the effect that from the proceeds of certain personal property which would otherwise have gone to satisfy the lien of the mortgage, these four creditors were first to be paid.

(See Decree in this foreclosure case, Rec., pp. 191, 192, 205 and 206.)

It will be noted by this court that this appellant is continually going outside the record in this case and stating in its brief, its interpretation of what the "trial court said from the bench," and "what all the attorneys in this case knew" and matters of this sort. We deny this appellant's interpretation of such things said and known, which are not set forth in the record and we intend to bring with us pleadings which were presented in the trial court by this would-be intervenor, which were prepared by the Equitable Trust Company of New York, and if any reference is made to such matters outside the records on the argument of these appeals, we will ask leave of this court to show this court these pleadings to prove the true relationship between these two appellants, and if this court thinks it necessary we may answer in reply to this appellant's question as to why we did not ask the receiver to set up our defense for us in the foreclosure case; and if we answer this question we will state the fact to be that the receiver was not only receiving his salary as receiver but was working and receiving his pay as well from the allied interests, the bond holders and this appellant and had stated to us that he did not want to see us get a ~~suit~~ court and refused to give

us any information concerning the affairs or property of the debtor company and we had to obtain an order from the court befre we could see papers giving us this information.

This appellant says on p. 27 of its brief:

> "It is impossible to read the opinion of the District Court without seeing that his decision was largely influenced by the thought that if he knew all the facts there would appear somewhere among them sufficient reason for denying the application on the grounds of laches."

In other words, this appellant is charging the judge who tried this cause with being suspicious of this appellant. It is a peculiar charge, indeed, to say that a court, presumably a fair arbiter, having absolutely no interest in the matter except to deal out even handed justice between man and man, should grow suspicious of this appellant without any cause whatever.

On p. 18 of its brief this appellant says:—

> "The receiver by his answer in the foreclosure suit alleged that the lien of the trustee's mortgage did not cover certain personalty, pointing out quite specifically the property not so covered, and as to it he sought to have the decree so limited that this property should not be sold under foreclosure but should remain in his possession for administration in the general creditors' suit. Such, at least, was the necessary effect and his contention was sustained."

This is contrary to the fact. Here is what Judge Dietrict said. (Memo Decision, p 309, Record).

> "How could the receiver have shown such interest in a lien upon the property in behalf of the petitioner? However that may be, upon an examination of the receiver's answer and of the proofs, it will be seen that they were not sufficient to justify the court in finding or declaring any lien in favor of the petitioner or any other creditors. Proofs of the existence and status of claims were offered only by interveners and only touching their claims. The Court had no basis upon which to declare a lien in favor of petitioner."

That appellant's first point might have been well taken, were it not for the fact, which was conceded by counsel for appellant in the trial court in the foreclosure case, that its position is precisely the same and the share it will receive out of the funds in the hands of the receiver in the receivership suit is precisely the same that it would have been, had the appellees never intervened in this foreclosure suit and wrested $45,000 from the mortgagee.

Appellant made this admission in the trial court. (Records, 306.)

On page 22 of its brief this appellant states:—

> "The facts in regard to this entire matter appears in appellant's complaint in intervention. It was under oath and no denial was made of any of its statements and they must therefore be deemed admitted."

It is a peculiarly significant fact that the name of its president, H. Hobart Porter, though appearing so many times in the record in this foreclosure case, is not mentioned by this appellant in its brief. Espe-

cially is this so when this appellant now claims that the trial judge had to believe its petition for leave to intervene when it professed ignorance of this foreclosure case in its petition for intervention, and where it showed in the record that this appellant was one that ordered the commencement of the foreclosure suit, and especially is this significant where the record shows that its president sent a telegram in the midst of the trial of the foreclosure suit to aid its ally, the Equitable Trust Company of New York.

Is the trial court bound to believe any allegation this appellant may present, when the trial court knows from facts appearing in the record that such allegations are false?

It may be that in certain cases intervention is a matter of **right** and not a matter of **discretion.**

But where a petitioner to intervene is shown by the record in the case in which he is attempting to intervene, to be guilty of collusion, and laches; to be bound by the decree which bound the receiver; and to be estopped by its own actions; then surely, the Court would not be compelled to do a vain and useless thing, merely allow the intervention with the intention of immediately denying the intervener any rights in the case.

Furthermore, we thing it a very perilous position for appellant to take, that it has an absolute right to appeal after a decree has been entered.

Especially is this true where the effect of the intervention would be to set aside the decree of foreclosure.

On page 23 of its brief this appellant states:—

> "So Towle and the interveners did not urge any defense that would not have otherwise have been presented, nor did they take any independent action upon the trial."

This statement is diametrically apposed to the truth and the record in this case.

(Transcript, p. 309, last paragraph of Judge Dietrich's Decision.)

INTERVENTION.

THE AMERICAN WATER WORKS & ELECTRIC COMPANY SHOULD NOT BE ALLOWED TO INTERVENE.

1. Because of collusion with the bondholders and the trustee complainant in the foreclosure action.

2. Because it is guilty of laches.

3. Because it was bound by the pleadings of the receiver in the foreclosure suit.

4. Because it is estopped by the action of its president, H. Hobart Porter, as the record shows that the president of the American Water Works & Electric Company tried to prevent the four prior lien claimants from obtaining liens prior to the lien of the mortgage.

THE AMERICAN WATER WORKS & ELECTRIC COMPANY SHOULD NOT BE ALLOWED TO INTERVENE

Because, if allowed to intervene and become a

party, it would not be entitled to any equitable relief under its complaint in intervention as amended and submitted.

First: Because said amended complaint, and the record in this case shows that there was collusion between the American Water Works & Electric Company and the bondholders, by which they attempted to prevent the four prior lien claimants from obtaining prior liens over and above the mortgage lien.

Second: Because said amended complaint in intervention does not give valid excuse for the laches of the American Water Works & Electric Company and on the contrary shows, when read with the rest of the record in this case, that such delay in attempting to present its claim was deliberate and calculated and still a part of its program to aid the bondholders in preventing any of the creditors of the debtor corporation besides itself and the bondholders from obtaining anything free and above the lien of the mortgage.

Third: Because said complaint in intervention does not show why the American Water Works & Electric Company was not bound by the decree in the foreclosure action in which the receiver was a party defendant and filed an answer presumably in its capacity as receiver for all general creditors who had filed their claims but who had not proved them in the receivership suit.

Fourth: Because while said petition for leave to intervene and the second amended complaint as pre-

sented, while it attempts to profess utter ignorance of the foreclosure suit and the proceedings therein, refers to the record in the receivership suit and the foreclosure suit, in which records are contained proof so contradictory to this professed ignorance and so convincing that such allegations of ignorance and innocence are not considered credible.

Fifth: Because said complaint in intervention shows that there was collusion in this: That instead of asking to be allowed to intervene, in the same manner that the four claimants had attacked it, it simply asked to intervene for the purpose of pro rating in what little the four claimants had wrested from the bondholders and the National Securities Corporation, which corporation was undoubtedly going to take care of the claim of the American Water Works & Electric Company in the reorganization plans.

Sixth: This collusion and deliberate laches is further shown by the fact that when the appellees attempted to intervene, in the foreclosure suit, the complainant and filed motions and objections to the interventions and moved to strike them out, on the grounds that it would prolong the litigation and that parties were coming in not of its own choosing, but when the American Water Works & Electric Company attempted to intervene, the complainant did not object to this party prolonging the litigation and did not say that this was an intruder not of its own choosing?

Seventh: Because said petition for leave to inter-

vene does not show any lack of equity on the part of the four special claimants. It does not show that the four claimants are depriving other general creditors of anything which they otherwise would have had.

Eighth: Because the petition for leave to intervene does not show that the lien of the mortgage was not good as between the mortgagor and the mortgagee, and as against the receiver, and as against all creditors until attacked by appropriate court proceedings; nor that the lien is not still good because the receiver has not seen fit to attack the mortgage.

Ninth: Intervention is too late.

Tenth: Because these four claimants have been injured by the delay of the American Water Works & Electric Company in attempting to intervene, as these four claimants have stipulated that the property upon which the four claimants have a prior lien is of just sufficient value to pay their own claims with interest and had they known that this American Water Works & Electric Company was intending to make a belated attempt to pro rate in that sum, these creditors might have fixed a value very much higher on the property on which the court held that these four claimants had a prior lien.

Eleventh: This delinquent attempt to intervene has injured us by its laches, and has by its laches allowed us to put ourselves in a position which is inferior to a position we could have taken had we known that it would intervene.

Twelfth: This delinquent applicant to intervene sat by and did not aid us in our attack on the mortgage, and the president of the American Water Works & Electric Company, now asserting this claim to intervene for the purpose only of pro rating, not of obtaining anything further from the mortgage on its own behalf, aided the mortgagee and consented to the proceedings to foreclose the mortgage, having prior to that time sold out its bonds to the mortgagee.

Thirteenth: Because the petition for leave to intervene shows that this applicant to intervene has sold this claim to the mortgagee and undoubtedly expects to get paid for it by the mortgagee, and that it now asserts the claim merely as a cat's paw to aid the mortgagee in an attempt to wipe out all creditors except the mortgagee and this large claimant.

Fourteenth: We have not injured other creditors or misled them.

Fifteenth: There must be an end to litigation.

Sixteenth: Because the amended petition of the American Water Works & Electric Company shows that it can be paid in full for its claim by the National Securities Corporation or that it has an action for breach of contract against a presumably solvent corporation.

Seventeenth: Because we have established prior claims of the date of December 6, 1915, and have been placed in positions by equity, that at law would have amounted to prior executions of date Decem-

ber 6, 1915, upon $45,000.00 worth of personal property of the judgment debtor. So, if an intervenor were allowed to come in and establish a lien, such a lien of date three months later than ours, would only attach upon such surplus remaining after our prior liens had been fully satisfied and discharged.

THE RECEIVER WAS AN ORIGINAL PARTY TO THE FORECLOSURE SUIT AND IS BOUND BY THE DECREE, LIKEWISE THOSE WHOM THE RECEIVER REPRESENTD IN THE FORECLOSURE SUIT, ARE BOUND BY THE DECREE.

The receiver is bound by the decree, and at the time the receiver was bound by the decree, he was representing the American Water Works & Electric Company, and the other general creditors in the receivership suit who were not appearing for themselves in this foreclosure suit.

The receiver was right there in court at the time of the trial of this foreclosure action and could have made any defense he saw fit to make against the mortgage.

At the time when the decree was entered, on Dec. 6, 1915, and at all times prior thereto, and at all times subsequent thereto up until the 28th day of February, 1916, the American Water Works & Electric Company had simply filed its claim in the receivership suit. It had not proved its claim in the receivership suit. If the American Water Works & Electric Company was represented by the receiver

in the foreclosure suit, then the American Water Works & Electric Company was bound by the decree.

> "Where the receiver of a corporation required by the order appointing him to defend any suit seeking to establish a lien against the corporation's property, intervened in a foreclosure suit against the corporation brought in the same court, and litigated the claim of the complainant therein under his mortgage to a fund due the corporation, a decree awarding the fund to the mortgagee is binding not only on the receiver, but also on all parties to the suit in which he was appointed, including interveners therein, such parties being represented by him, and neither necessary nor proper parties to the foreclosure suit."
>
> Atlantic Trust Co., v. Dana, 62 C. C. A., 657, 128 Fed. 209.

Why does not the claimant, the American Water Works & Electric Company, ask the receiver to sue or intervene as it claims we should have done? It does not show that it asked the receiver to sue. It claims to have brought the application to intervene on behalf of itself and others similarly situated and it claims in its petition and complaint for leave to intervene that there are creditors to the extent of $4,000,000. It s quite noticeable, however, that this claimant, the American Water Works & Electric Company, stands alone in its attack upon the four creditors who have succeeded in taking $45,000.00 away in spite of the lien of the mortgage. No other creditor has availed itself of the opportunity to be-

come associated with this large and powerful litigant.

Why did the Equitable Trust Company not make a motion to dismiss the petition of the American Water Works & Electric Company to intervene? It objected to the intervention of the four creditors on the grounds that it would prolong the litigation.

"AN INTERVENTION THAT SAVORS OF LACHES AND IS OF DOUBTFUL EQUITY WILL NOT BE PERMITED."

Central R. R. Co. v. Farmers L. Co. 112 Fed 81.

Section 1372 Streets Fed. Eq. Practice.
U. S. v. Northern Securities Co., 128 Fed. 808.

"The right of intervention should be asserted within a reasonable time, and under Code Civ. Pro. Dakota, Sec. 90, providing that a complaint in intervention must be filed by leave of court, it is not error to refuse to allow such a complaint to be filed on the eve of trial, after the action has been pending two years, and in behalf of one who has slept upon his rights."

Smith v. Gale, 144 U. S. 509, 36 L. Ed. 521.

"But where it appears that the applicant has been guilty of laches, permission to intervene may be denied or granted upon terms."

"It is a general rule that an intervention will not be allowed when * * * it will change the position of the original parties."

"It is usually provided by statutes authorizing intervention that the intervention must be made before trial. Under such a statute a motion comes too late after the cause has been submitted to the court, or after default has been entered, under other statutes an intervention

may be filed at any stage of the case, whether before or after issue joined, provided the intervention does not retard the principal suit. In any event, the action must be still pending and an intervention cannot be allowed after a cause has been settled by the parties, or after judgment."

31 Cyc. 519 et seq.

Under Code Civ. Pro. 1887, Sec. 24, providing that any person may intervene **before the trial** of an action, a party cannot intervene after a default for want of an answer has been entered and not set aside.

Safely v. Caldwell, 42 Pac. 766. (Cal.)

Code Civ. Pro. 387, provides that any person may intervene in an action **before the trial.** After a judgment for foreclosure by default had been entered against an administratrix, an heir at law obtained leave ex parte to intervene in the action. Plaintiff moved to dismiss the complaint in intervention, and the motion was sustained. Held: That the intervention was made **too late,** and as leave to file same was given ex parte, the action of the court dismissing intervenor's' complaint was proper.

Hibernia Sav. & Loan Soc. v. Churchill, 61 Pac. (Cal.) 278.

Under Ballinger's Annotated Codes & St. 4846, providing that any person may, **before trial,** intervene, etc., a complaint in intervention must be filed before trial.

Seattle & N. Ry. Co., vs. Bowman, 102 Pac. (Wash.) 27.

The statute relating to intervention applies where one at some stage of the proceeding before trial is shown to have an interest which would make him a proper party.

Houston R. E. Inv. Co. v. Hechler, 138 Pac. (Ut.) 1159.

In Seligman v. City of Santa Rosa, 81 Fed (Circuit Court N. D. California, April 10, 1897) Head Note: Equity Procedure—Intervention. Under Section 387, Code Civ. Pro. Cal., providing that any person interested may intervene in an action or proceeding **'before the trial,'** an application to intervene comes too late which is made at the time of the submission of the case on bill and answer."

"The motion afterwards made to have the judgment set aside, and for leave to intervene, was an application to the **sound discretion** of the court. To the action of the court on such a motion, no appeal lies, nor is the subject of a bill of exceptions or writ of error."

Conner v. VanNess, 18 How. 394, 15 L. Ed. 432.

"Where an order granting conditional leave to intervene is set aside before the condition is complied with, the case stands the same as though the application had been denied in the first instance; and where the showing made by the petition is such that the granting or refusing leave to intervene was **discretionary,** the petitioner not being entitled to such leave as a matter of right, the order refusing such leave is not appealable."

Appeal from Circuit Court of Western Dist. of Mo. On motion to dismiss appeal.

Mass. Loan & Trust Co. v. Kansas City, 110 Fed. 28.

"No appeal lies from an order of the circuit court refusing petitioners leave to intervene and become parties to the suit. Only parties can appeal."

Re Cutting, 94 U. S. 14, 24 L. Ed. 49.

"The **discretion** of the chancellor in refusing to allow intervention in a suit which has been long pending will not be reviewed by the appellate court."

Gunderson v. Ill. Trust Co. 100 Ill. Ap. 461, 199 Ill. 420.

Whitehouse Equity Prac. Vol. 1, p. 389n.

"Applications for leave to intervene in a case after entry of a final decree **are very unusual.** They are never granted as a matter of course, and, owing to the tendency of such applications to occasion delay and prolong the existing litigation, they ought not to be granted unless it is necessary to do so to preserve some right which cannot otherwise be protected, or to avoid some complication that is liable to arise."

United States v. Northern Securities Co., 128 Fed. 808 at 810.

In Credits Commutation Co. vs. United States, 91 Fed. 573, 34 C. C. A. 12, Aff'd. 177 U. S. 311, 44 L. Ed. 782, it is held that an appeal does not lie from an order of the court below denying a motion in a pending suit to permit a person to intervene and become a party thereto and cites to the same effect:

Ex parte Cutting, 94 U. S. 14, 24 L. Ed. 49,
Guion v. Liverpool etc. Co., 109 U. S. 173, 27 L. Ed. 895.

THE AMERICAN WATER WORKS AND ELECTRIC COMPANY SHOULD NOT BE ALLOWED TO INTERVENE, BECAUSE, IF ALLOWED TO INTERVENE AND BECOME A PARTY, IT WOULD NOT BE ENTITLED TO ANY EQUITABLE RELIEF UNDER ITS PETITION FOR LEAVE TO INTERVENE AND COMPLAINT IN INTERVENTION AS SUBMITTED, FOR THE REASON, THAT THE FOUR LIEN CLAIMANTS HAVE ESTABLISHED PRIOR LIEN CLAIMS OF THE DATE OF PRIORITY OF DECEMBER 6, 1915, AND BY EQUITY HAVE BEEN PLACED IN POSITIONS WHICH, AT LAW, WOULD HAVE AMOUNTED TO PRIOR EXECUTIONS MADE ON DECEMBER 6, 1915, UPON $45,000 WORTH OF PERSONAL PROPERTY OF THE JUDGMENT DEBTOR.

Our position is:

That the receiver takes possession of the assets of an insolvent debtor subject to existing liens.

Section 138 High on Receivers.
Black et al vs. Manhattan Trust Co. et al., 213 Fed. 692.
34 Cyc., 191, 193.

So that when the receiver of property of this insolvent corporation took possession, all of the property of the corporation was subject to the lien of the mortgage, as the mortgage covered all of the property of the corporation.

This mortgage was a valid lien upon all of the

›perty of the debtor corporation, and was a valid
ı as between the mortgagor corporation and the
·tgagee;

Marchand v. Ronaghan, 9 Idaho, 95;

and was a valid lien as to all of the property of the debtor corporation as to all of the world, until attacked by some proper, interested party, setting up prior claims to the lien of the mortgage.

On the 23d day of October, 1915, four creditors pleaded, in another suit, this foreclosure suit at bar, and proved on the hearing, facts which, but for the fact that the assets of the debtor corporation were in the hands of the receiver, entitled these four claimants to a judgment against the insolvent corporation, and this Court held in its decree dated the 6th day of December, 1915, that these four claimants were entitled to a prior lien over and above the lien of the mortgage, on certain personal property of the debtor corporation, not forming a constituent part of the said public service corporation's plant. These four claimants had appeared for themselves only and not on behalf of other creditors. These four claimants were not attempting to get a prior lien upon a trust fund which, but for their liens, would otherwise have been distributed to the general creditors. These four claimants were endeavoring to obtain a lien prior to the mortgage lien upon enough property to pay their own claims and were attempting to obtain prior liens upon property that otherwise would not have gone to pay

general creditor's claims, but would have gone to pay off the lien of the mortgage.

Had it not been for the fact that the assets of the debtor corporation were then in the hands of the receiver, subject, however, to the lien of these four claimants and also to the lien of the mortgage, these four claimants could have had execution issued on the 6th day of December, 1915, and could have sold personal property on which the Court held that the four claimants had a prior lien, without regard for any other claimants that might have sued out liens of later date.

The Court fixed the liens of these four claimants as prior liens on certain personal property, over and above, yet covered by, the lien of the mortgage, and fixed the date of these liens, tantamount to judgment liens, on December 6, 1915.

On what theory of law or equity does a judgment lien claimant of subsequent date claim the right to pro rate with prior judgment claimants?

Suppose that an intervenor were now allowed to come in, and the Court should now decide that such intervening creditor had a prior lien to certain personal property over and above the lien of the mortgage, would a lien which practically amounts to a judgment lien, of a subsequent date to the lien of the four claimants be allowed to pro rate with prior judgment liens?

But suppose that the intervenor should contend that under theh doctrine of Chemical National Bank

vs. Armstrong, the adjudication of insolvency and the appointment of a receiver, worked an equitable levy upon the assets of the insolvent corporation.

Even then, it must be conceded that the equitable levy, thus effected, would be only a levy upon such assets as were subject to such a lien. The assets of this corporation being already subject to a lien, good as between the mortgagor and mortgagee, and as to all the other creditors until a paramount lien was asserted in a proper manner, there would be no assets covered by the mortgagee upon which the lien of the receiver could attach.

If the receiver, or the creditors for themselves, had taken the proper steps to assert a lien prior to the mortgage lien, and had established a prior lien of certain date, then that would be a different matter and such creditors would pro rate in the proceeds resulting from their common judgment. But where the receiver does not attack the lien of the mortgage by appropriate pleadings and does not ask in his answer for a lien, prior to the lien of the mortgage, and the court does not give him a lien in the decree, then whatever possession the receiver has is subject to the existing liens, and it would take appropriate action on his part or appropriate action by the creditors themselves on their own behalf to render the lien of the mortgage subsequent to the lien of the creditors. The receiver and other creditors had ample time and notice of the foreclosure proceedings to take action to render the lien of the mortgage subsequent to the liens which creditors might have

had on certain personal property subject to the lien of the mortgage. These four claimants took what this court regarded as proper action to establish their liens, and they took such actions in their own behalf and for themselves only and this court has recognized them in the decree and has fixed the date of priority of their liens as of December 6, 1915.

Now, under what theory does a subsequent lien claimant claim the right to pro rate with a prior lien claimant under the facts of this particular case?

Priorities in this equitable proceeding are governed by the rules of equity.

Our position is this, that when the court rendered its decree on December 6, 1915, and the some was docketed, these four claimants might have had execution issued and levied upon the identical personal property which was sold for $45,000.00 under the decree. That being true, then our equitable lien actually attached to that identical personal property on that date.

Now, that being practically equal to an execution at law, our title then became practically the prior legal title. Then, admitting that there are equal equities ,this, now practically legal title, which we have acquired, must prevail.

> "The lien of the mortgage continues upon the **fund** as it subsisted upon the premises before they were sold."
>
> Olcutt v. Bynum, 17 Wall. 44, 21 L. Ed. 570.
> No. 488 Mtgs. U. S. Sup. Ct. Dig.

Liens upon mortgaged property attach to the **proceeds** of the sale in the same **order** and with the same effect as they bound the premises before the sale.

Markley v. Langley, 92 U. S. 142, 23 L. Ed. 701.

Mtgs No. 494 U. S. Sup. Ct. Dig.

Therefore the liens of the claimants have attached to the **proceeds** as of date Dec. 6, 1915, upon the $45,000.00 of the purchase price.

Furthermore, these proceeds amount to $2,000,000 in the foreclosure suit.

By the decree, the court had these proceeds placed in the hands of a special master. This special master holds as trustee under the decree $2,000,000, under the decree for the mortgagee and these four claimants, and to be distributed according to the terms of the decree in the foreclosure suit.

"Money **in custodia legis**, in the hands of the clerk of the court in his official capacity, cannot be made the subject of a creditor's bill."
6 Pom. p. 1423.

Anheuser-Busch v. Hier, 52 Nebr., 424, 72 N. W. 588.

United States v. Eisenbois, 88 Fed. 4.

"WHERE THERE IS EQUAL EQUITY THE LAW MUST PREVAIL."

Pomeroy Eq. Rem.

"Sec. 417.—The meaning of the maxim is, if two persons have equal equitable claims upo nor

interests in the same subject matter, or in other words if each is entitled to the protection and aid of a court of equity with respect to his equitable interest, and one of them, in addition to his equity, also claims the legal estate in the subject matter, then, he who thus has the legal estate will prevail. This precedence of the legal estate might be worked out by the court of equity refusing to interfere at all, and thereby leaving the parties to conduct their controversy in a court of law, where, of course, the legal estate alone would be recognized. One of the most frequent and important consequences and applications of this principle is the doctrine, that when a purchaser of property for a valuable consideration and without notice of a prior equitable right to or interest in the same subject matter, obtains the legal title in addition to his equitable claim, he becomes, in general, enitled to a priority both in equity and at law."

CREDITOR SUING FOR HIMSELF OBTAINS PRIORITY.

Sec. 893, Pom. Eq. Rem.

"It is a general rule that in a judgment creditor's suit a single creditor may file a bill on his own behalf; that he is entitled to retain the priority thereby gained over other creditors, and cannot be forced to divide with them."

Sentor v. Williams, 61 Ark. 189, 54 Am. St. Rep. 200.

Elmore v. Spear, 27 Ga. 193, 73 Am. Dec 729.

Gordon v. Lowell, 21 Me. 253.

George v. Williamson, 26 Mo. 190, 72 Am. Dec. 203.

Pullis v. Robinson, 73 Mo. 201, 39 Am. Rep. 497.

McDermott v. Strong, 4 Johns Ch. 687.

Edmeston v. Lyde, 1 Paige Ch. 637, 19 Am. Dec. 454.

Corning v. White, 2 Paige 567, 22 Am. Dec. 659.

Hammond v. Hudson, 20 Barb, 378.

Clark v. Figgins, 31 W. Va., 157, 13 Am. St. Rep. 860, 5 S. E. 643.

In Edgell v. Haywood, 3 Atk. 357, it was said:

"The person who first sues has an advantage by his legal diligence in all cases. The complainant by his judgment and execution at law, and by his diligence in this court, has obtained a position which entitled him to a priority over the other creditors of the debtor."

Sec. 893—Pomeroy's Eq. Rem.

"Three methods of procedure are open to the creditor whose execution at law is returned unsatisfied, was the conclusion arrived at by Chancellor Walworth, in a leading case; that 'he might file a bill to reach the equitable estate of the defendants, either in his own name or for his own benefit, or might join with others standing in the same situation in a joint suit for their joint benefit, in proportion to the amount due to each, * * * or, that he might file a bill in the usual way, in behalf of himself and all others standing in the same situation, as judgment creditors whose executions had been returned unsatisfied, and who might choose to come in under the decree, and contribute to the expenses of the suit.' I can see no reasonable objection to either mode of proceeding. The latter, at first blush, may appear the most equitable, but the first two are much more likely to insure a vigorous prosecution of the suit, and, on further examination, it may seem unjust that the creditor who has sustained all of the risk

and expense of bringing his suit to a successful termination, should in the end be obliged to divide the avails thereof with those who have slept upon their rights, or who have intentionally kept back that they might profit by his exertions, when there could no longer be any risk in becoming parties to the suit. Since priority among different creditors' bills is gained by the creditor who first files his bill and serves process, it is said to be immaterial in what order the judgments which are the foundations of the different suits recovered."

EQUAL EQUITIES: First in order of **time.**

Secs. 416, 591, 678, 682, 718.—Pomeroy.

"As between persons having only equitable interests, if their interests are **in all other respects equal,** priority in time gives the better equity."

"In examining into the relative merits (or equities) of two parties having adverse equitable interests, the points to which the court must direct its attention are obviously these; the nature and condition of their respective equitable interests, the circumstances and manner of their acquisition, and the whole conduct of each party with respect thereto. And in examining into these points, it must apply the test, not of any technical rule, or any rule of partial application, but the same broad principles of right and justice which a court of equity applies universally in deciding upon contested rights."

"Sec. 415—Its Effect.—It follows from this explanation of the principle that when several successive and conflicting claims upon or interests in the same subject matter are wholly equitable, and neither is accompanied by the legal estate, which is held by some third person, and neither possesses any special feature or inci-

dent which would, according to the settled doctrines of equity, give it a precedence over the others wholly irrespective of the order of time, under these circumstances the principle applies, and priority of claim is determined by priority of time."

1 Pomeroy's Eq. Jurisprudence, 690, 691, 692, Pages.

"Sec. 718.—Priority of Time among equal equities.

"The general doctrine is well settled, as already stated, that among successive equitable estates, liens and interests which are equal—that is, where neither claimant holds the legal estate or has the best right to call for it, and neither is intrinsically superior to the others, nor is affected with any collateral incident, such as negligence or fraud—the order of time controls, even though a subsequent holder acquired his interest without any notice of the prior one. Under these circumstances the maxim QUI Prior EST TEMPORE, POTIOR EST JURE, applies. The doctrine has been fully recognized and constantly enforced by American courts wherever its operation has not been interfered with or modified by the recording acts."

2 Pomeroy p. 1260.

EQUITY AIDS THE VIGILANT, NOT THOSE WHO SLUMBER ON THEIR RIGHTS.

"Section 418. Its Meaning. It is a rule controlling the Administration of Remedies. The principle embodied in the maxim, the original form of which is Vigilantibus non dormientibus aequitas subvenit, operates throughout the entire remedial portion of equity jurisprudence, but rather as furnishing a most important rule controlling and restraining the courts in the administration of all kinds of reliefs, than as

being the source of any distinctive doctrines of the jurisprudence. Indeed, in some of its applications it may properly be regarded as a special form of the yet more general principle. He who seeks equity must do equity. The principle thus used as a practical rule controlling and restraining the award of reliefs is designed to promote diligence on the part of suitors, to discourage laches by making it a bar to relief, and to prevent the enforcement of stale demands of all kinds, wholly independent of any statutory periods of limitation. It is invoked for this purpose, and in all classes of cases, except perhaps those brought to enforce a trust against an express trustee.

Pomeroy's Equity Jurisprudence, 3rd Edition.

"Section 461, High o nReceivers, 4th edition.

"As between different judgment creditors of the same debtor, one of whom by his superior diligence, obtains possession of or a charge upon the debtor's property, equity will not interfere in behalf of a more dilatory creditor to disturb such possession."

In conclusion we submit that the decree and orders of the trial court should be affirmed in all respects. The appellees who attacked the trust deed and mortgages were vitally interested parties; they would necessarily be affected by the direct legal operation of the decree to be rendered between the original parties, for the decree sought would have devoured the only property from which they could possibly expect their claims to be paid. State statutes declared the trust deed and mortgages void as to creditors, and these creditors by their petitions

to intervene showed that they had placed themselves in a position to challenge the validity of these instruments. The deed of trust and supplemental mortgages are only invalid to the extent necessary to pay the claims of the four attacking creditors. The claim, made by the appellant, the Equitable Trust Company of New York, that the proceeds of the personality upon which the claims of the attacking creditors had been declared superior to that of the Equitable Trust Company should be turned over to the receiver in order that the Equitable Trust Company might pro rate therein with a deficiency judgment is a sham. It is made only for the purpose of aiding its friend and ally, the American Water Works & Electric Company. The appellant, Equitable Trust Company of New York, never made such a request or contention in the trial court. It has no deficiency judgment and never will have one and has waived this point for the purpose of this appeal.

As to the appellant, the American Water Works & Electric Company, it fought shoulder to shoulder with the mortgagee and bondholders in the trial court and did everything within its power to prevent appellees from taking anything from its friend and ally, the Equitable Trust Company of New York. This it did under an agreement by which it was to receive its pay from the National Securities Corporation. It was perfectly willing then to make some secret arrangement with the mortgagee by which, perhaps, it was to receive pay for its claim

in full. Why did it not ask other creditors to come in and pro rate in its contemplated deal with the mortgagee? Why did it not explain fully to the trial court the reason for its president aiding the mortgagee in an effort to crush the attacking creditors? We have never injured the American Water Works & Electric Company, and have never sought to do so. Certainly many explanations were due from this appellant to the trial court before it could demand as a matter of right that it be allowed to change its colors and intervene and come to our side and take away from us 96½ per cent of the fruits of a hard won victory.

The American Water Works & Electric Company has made its own bed and should be compelled to lie in it.

Respectfully submitted,

PARIS MARTIN,
WILLIAM E. CAMERON,
ALFRED A. FRASER,
Solicitors for Appellees.

Residence, Boise, Idaho.